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WELFARE AND FEDERALISM’S PERIL

Andrew Hammond*

Abstract: Recent scholarship on American federalism lacks case studies to inform that scholarship’s trans-substantive insights and claims. This Article examines the last two decades of devolution brought about by the 1996 Welfare Reform Act (PRWORA). It details the history of PRWORA and how the funding mechanism built into Temporary Assistance for Needy Families (TANF)—the TANF block grant—guaranteed the program’s deterioration. The Article documents the program’s failure to respond to increased need among poor families after Hurricane Katrina and in the Great Recession, showing how the federal government’s use of TANF in both crises teach us the limits of fiscally devolved programs. The Article then explores two potential paths forward for TANF as either a devolutionary outlier in social policy or as a harbinger of what is to come from recent Congressional proposals to block grant Medicaid and SNAP (food stamps). Public interest lawyers rightly fear that TANF could be the cutting edge of a newly devolved American safety net. The Article concludes by considering what the cautionary tale of TANF means for scholars of federalism and anti-poverty advocates.

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INTRODUCTION

State administration of the American safety net is as old as the safety net itself. Established by the Social Security Act of 1935, Aid to Families with Dependent Children (AFDC)¹—what people think of as “welfare”—was always administered by state governments. For sixty years, many states made programmatic changes to AFDC in attempts to regulate the behavior of recipients. But in 1996, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA)² radically changed the nature of federal-state relations in cash assistance. AFDC and its cooperative federalist structure gave way to Temporary Aid to Needy Families (TANF), a program funded through block grants that drastically increased state discretion.³ The federal government devolved the allocation of cash assistance resources directly to the states. Nearly two decades since PRWORA's enactment, legal aid lawyers and scholars of American federalism can now evaluate how TANF has fared as an experiment in devolving basic programmatic design and fiscal responsibility to the states. Such reflection is particularly warranted as Congress considers whether and how to restructure Medicaid, the Supplemental Nutrition Assistance Program (SNAP), formerly food stamps, and other safety net programs along the same lines of the TANF Block Grant.

The policy results of the TANF block grant are sobering. TANF is less

1. Title IV of the Social Security Act of 1935, Pub. L. No. 74-271, 49 Stat. 620, (codified as amended at 42 U.S.C. §§ 301–1397) (establishing “grants to states for aid to dependent children”).

2. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

3. *Id.* § 103 (creating TANF block grants in place of AFDC).

effective than AFDC at pulling families out of deep poverty.⁴ Deep poverty is increasingly a reality for very young children, and 3 million Americans are disconnected from the safety net with no connection to the labor market or government services.⁵ Meanwhile, states are using the TANF block grant to plug budget holes, diverting federal funding intended for needy families to meet other funding gaps and supplant state efforts in other areas.

Perhaps most telling, TANF no longer responds to economic downturns and concomitant increases in poverty.⁶ In the face of the largest economic crisis since the Great Depression, the federal government could not use TANF as an automatic stabilizer in the 2009 stimulus package. TANF had deteriorated to such an extent that it played only a minor part in the national strategy to face the deepest recession in eighty years. Moreover, states were so hampered by the revenue shortfalls from the recession itself that they could not deploy TANF to provide much-needed assistance to needy families. Instead, the federal government turned to other safety net programs, created a separate emergency fund for TANF families with a radically different funding structure, and created yet another waiver process to encourage states to depart from TANF's restrictions.⁷ Put simply, the federal government's response to the Great Recession unmasked TANF's deterioration—a deterioration brought about by TANF's devolutionary design.

This Article argues that the experience of TANF should inform both the scholarship on American federalism and anti-poverty advocacy. TANF's demise should dampen the desires of both academics and advocates to devolve program design and funding decisions to state governments. I develop this argument in four parts. In Part I, I summarize recent scholarship on American federalism and explain why case studies about specific areas of federal-state policy and programs can inform that scholarship's trans-substantive insights and claims. In Part II, I detail the history of PRWORA and how the fiscal federalism built into the legislation guaranteed the deterioration of TANF since 1996. In Part III, I document the program's failure to respond to increased need after Hurricane Katrina and in the Great Recession and what the federal government's use of TANF in both crises teach us about the law of

4. See DAVID SEITH, FIRST FOCUS, COSTLY CONSEQUENCES: THE REAL IMPACT OF CONGRESS' ELIMINATION OF THE TANF SUPPLEMENTAL GRANTS (2012), <https://firstfocus.org/wp-content/uploads/2012/09/FirstFocus-Poverty-CostlyConsequencesTANFSupplementalGrants.pdf> [<https://perma.cc/Z5TR-3R65>].

5. See *id.*

6. See *infra* Part III.

7. See *infra* section III.A.

devolved programs. In Part IV, I explain why the degree of discretion in program design and financing given to the states in TANF makes the program a devolutionary outlier in social policy—contrasting TANF with other income support programs like SNAP, the Earned Income Tax Credit (EITC), and Supplemental Security Income (SSI)—and why recent Congressional proposals to block grant other public benefits are so wrong-headed. I conclude by exploring what the cautionary tale of TANF means for federalism scholars and anti-poverty lawyers.

I. THE PROBLEM WITH TRANS-SUBSTANTIVE FEDERALISM

In Part I, I argue that legal scholarship on federalism should include case studies of recent law and policy reform in various substantive areas. I suggest one area ripe for inquiry is the American safety net, which exhibits various federalism designs.

A. *Federalism Scholarship and the Need for Case Studies*

Federal-state relations have preoccupied the last thirty years of American public law. Demands for devolution from the national to state governments in the 1980s led to sweeping changes in how states and the federal government interact—and how the American polity funds, implements, and changes policy. Policymakers have experimented with various combinations of federal-state funding and implementation in areas as diverse as criminal law,⁸ environmental law,⁹ public education,¹⁰ and health care.¹¹

The last three decades of changes in federal-state relations has largely come at the behest of conservative policymakers and interests,¹² but

8. See generally Rachel E. Barkow, *Federalism and Criminal Law: What the Feds Can Learn from the States*, 109 MICH. L. REV. 519 (2011); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969 (2008).

9. See generally William W. Buzbee, *Contextual Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 108 (2005); Dan C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570 (1996).

10. See generally Thomas Kleven, *Federalizing Public Education*, 55 VILL. L. REV. 369, 393 (2010); Michael A. Rebell, *Fiscal Equity in Education: Deconstructing the Reigning Myths and Facing Reality*, 21 N.Y.U. REV. L. & SOC. CHANGE 691, 708 (1994); Kimberly Jenkins Robinson, *The Past, Present, and Future of Equal Educational Opportunity: A Call for a New Theory of Education Federalism*, 79 U. CHI. L. REV. 427, 429 (2012).

11. See generally John Holahan & Mary Beth Pohl, *Leaders and Laggards in State Coverage Expansions*, in *FEDERALISM & HEALTH POLICY* 179 (John Holahan et al. eds., 2003); SHANNA ROSE, *FINANCING MEDICAID: FEDERALISM AND THE GROWTH OF AMERICA'S HEALTH CARE SAFETY NET* (2013); Abbe R. Gluck, *Federalism from Federal Statutes: Health Reform, Medicaid, and the Old-Fashioned Federalists' Gamble*, 81 FORDHAM L. REV. 1749 (2013).

12. See generally TIMOTHY CONLAN, *FROM NEW FEDERALISM TO DEVOLUTION* (1998); Ernest A.

recently, liberal policymakers and scholars have been advocating for a kind of progressive federalism.¹³ Spurred by gridlock in Washington and innovations in states on a host of issues like education reform, environmental policy, and civil rights, these new federalists have rehabilitated devolutionary design on the left. Indeed, one could have characterized many of then-President Obama's domestic initiatives as animated by progressive federalism, such as the U.S. Department of Education's Race to The Top¹⁴ and the replication of the Harlem Children's Zone model through the Promise Neighborhoods program.¹⁵ The allure of progressive federalism has only grown in the wake of the 2016 election. But those who are tempted by the promise of progressive federalism would do well to examine the devolution and subsequent deterioration of TANF.

Scholars have identified various forms of federalism, including cooperative and uncooperative, opt-in and polyphonic.¹⁶ Many detect examples of these theories in American law.¹⁷ Some have seen the virtues of a federal system because it promotes a productive redundancy, for dialogic or enforcement reasons.¹⁸ Others have challenged the jurisdictional formalism of federalism, calling for a look at the other institutions that are not state or federal, but translocal, interdependent, and transnational.¹⁹ Some of these accounts have focused on substantive areas

Young, *Popular Constitutionalism and the Underenforcement Problem: The Case of the National Healthcare Law*, 75 LAW & CONTEMP. PROBS. 157, 160 (2012).

13. See, e.g., Richard B. Freeman & Joel Rogers, *The Promise of Progressive Federalism*, in REMAKING AMERICA 205, 205 (Jacob Hacker ed., 2007) (arguing that "the progressive disposition against federalism is outdated"); Heather K. Gerken, *A New Progressive Federalism*, DEMOCRACY (2012), <https://democracyjournal.org/magazine/24/a-new-progressive-federalism/> [<https://perma.cc/GQX3-G82Q>] (arguing that it is a "mistake to equate federalism's past with its future").

14. U.S. DEP'T OF EDUC., FUNDAMENTAL CHANGE INNOVATION IN AMERICA'S SCHOOLS UNDER RACE TO THE TOP, at iv (2015), <https://www2.ed.gov/programs/racetothetop/rttfinalrptfull.pdf> [<https://perma.cc/ZKB4-2TR9>].

15. *Programs: Promise Neighborhoods*, U.S. DEP'T OF EDUC., OFFICE OF INNOVATION & IMPROVEMENT (July 27, 2017), <https://www2.ed.gov/programs/promiseneighborhoods/index.html> [<https://perma.cc/EF5F-XHK4>].

16. See generally ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM (2009); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1308 (2009); Brendan S. Maher, *The Benefits of Opt-In Federalism*, 52 B.C. L. REV. 1733, 1779 (2011).

17. See, e.g., Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1550 (2012) ("Every flavor of federalism can be found somewhere in our system.").

18. See generally Robert M. Cover, *The Uses of Jurisdictional Redundancy*, 22 WM. & MARY L. REV. 639 (1981); Adam B. Cox, *Enforcement Redundancy and the Future of Immigration Law*, 2012 SUP. CT. REV. 31; Amanda M. Rose, *State Enforcement of National Policy: A Contextual Approach (with Evidence from the Securities Realm)*, 97 MINN. L. REV. 1343 (2013).

19. Judith Resnik, *What's Federalism for?*, in THE CONSTITUTION IN 2020, at 269 (Jack M. Balkin

of law.²⁰ Others have sought to confront and challenge criticisms of federalism and state autonomy.²¹

Some scholars admit that there is a need for case-specific federalism.²² Perhaps legal scholars would rather defer to subject-matter experts to suggest which version of federalism best describes a given field.²³ Rather than leave it to policymakers to operationalize federalism, legal scholars themselves should seek to understand how government creates and maintains federalist structures in specific policy arenas.²⁴ Now that scholars have broken through the states' rights versus national standards debate of the twentieth century and provided us with a more sophisticated understanding of a continuum of federalism, we would do well to test those various federalist designs against areas of substantive law and policy.

A case-study approach to federalism would yield multiple benefits to the field. First, it would force scholars who are debating the costs and benefits of various federalism designs to be more forthcoming about which areas of substantive law they have in mind. Some scholars have championed federalism in the name of a specific area of law like environmental law.²⁵ By drawing on cases to support their normative claims about federalism, scholars would arrive at a better understanding of which areas of law are best suited for which level of government.

& Reva B. Siegel eds., 2009); see also Judith Resnik, Joshua Civin & Joseph Frueh, *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709, 726–28 (2008).

20. See *supra* notes 1–3; *infra* note 103.

21. Gerken, *supra* note 13; see also Deborah Jones Merritt, *Three Faces of Federalism: Finding a Formula for the Future*, 47 VAND. L. REV. 1563, 1574 (1994) (explaining how “state governments help diversify participants in the political process” (citation omitted)).

22. See, e.g., Bulman-Pozen & Gerken, *supra* note 16, at 1308 (admitting to have “deliberately offered a simplified account of uncooperative federalism in order to present our thesis in a clear and crisp form” and suggesting that “[c]ase studies would be particularly helpful in adding needed texture to the story about states we have offered here”); Gerken, *supra* note 17, at 1552 (insisting that “[f]ederalism debates are best understood not as disagreements over which model to choose but as disputes over how to strike the right balance between different types of institutional arrangements,” but that “[s]uch debates, however, can only be hashed out in context-domain by domain, policymaking arena by policymaking arena”); see also Ernest A. Young, *A Research Agenda for Uncooperative Federalists*, 48 TULSA L. REV. 427, 453 (2013).

23. Gerken, *supra* note 17, at 1573 (“It would not be surprising that a field as complex and variegated as federalism required more than one theory to describe it.”).

24. See Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 577 (2011) (showing how “within the [Affordable Care Act] alone, there are multiple—and sometimes conflicting—visions of the role of the states”).

25. See Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the “Race-to-the-Bottom” Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210, 1213–21 (1992) (explaining why the “Race to the Bottom” theory is misguided).

Second, these case studies would inevitably impact and alter our understanding of federalism, causing scholars to tweak and adapt their accounts as thick descriptions of substantive law illuminate cracks in their theories.

Last and perhaps most importantly, case-specific federalism would be more useful to policymakers and bureaucrats who must design policies, draft statutes, and implement programs. Rather than forcing decisionmakers to enter a broad, trans-substantive scholarly debate, one replete with its own academic argot, scholars could come to decisionmakers, deploying their insights to inform policymaking. A more accessible academic conversation might lead to more contributions by the bureaucrats themselves, whose understanding of both the regulatory detail and implementation reality of these programs contains a remarkable wealth of institutional knowledge that scholars often miss. It is time for scholars of federalism to capture the experience and legacy of specific programs in various areas of law. One such area that is ripe for inquiry is social welfare policy, an area that contains various federal-state schemes.

B. TANF as a Federalism Case Study in American Social Policy

American social policy is a revealing area to chart changes in federal-state relations. Thirty years ago, a poor single mother with two children encountered a safety net that included a national entitlement to cash assistance, some food assistance, federal health insurance, and nearly no subsidies for low-wage work. Today, a similarly situated mother encounters a safety net in which traditional “welfare” has all but disappeared, but the federal government has dramatically expanded health insurance and food assistance and created subsidies for low-wage workers.

Each of these forms of social assistance contains a different federal-state infrastructure.²⁶ TANF is federally funded through a block grant with wide discretion given to the state on benefit level, eligibility, and sanctions.²⁷ While SNAP is federally funded and administered by states, SNAP is funded through a means-tested entitlement rather than a block grant, and states pay only a portion of the administrative costs of the

26. Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 62 (2011) (pointing to safety net programs as federal examples “that allow states to propose variations on generally applicable standards within programs of cooperative federalism, often through demonstration waiver programs”).

27. 42 U.S.C. § 603 et seq. (2012).

program.²⁸ The federal government pays for every dollar of SNAP benefits.²⁹ SSI is federally funded and administered by local offices of the Social Security Administration, a federal agency. EITC is both federally funded and centrally administered by the IRS, although states have begun to add their own refundable tax-credits for low-income families.³⁰

While American social policy is rich in its federalist permutations, one must not overstate the applicable lessons from a study of one program. TANF is only one strand of the American safety net, and this Article analyzes a particular aspect of this program: namely, the block grant as a federalist-informed funding mechanism. Yet, it is fitting to focus on the block grant for it is this feature that should be of most interest to students of federalism.

A block grant is a funding mechanism that gives states more discretion than they typically have when implementing a federal program—whether that program’s implementing regulations are largely set by the federal government, as in the case of some Social Security benefits, or allow for cooperation between federal and state agencies, as in the case of SNAP.³¹ As this Article will demonstrate, the TANF block grant allows states to use funds in various ways, including several that depart significantly from the authorizing statute.³² But this analysis of the TANF block grant and its consequences for our understanding of federalism should be carefully extended to other areas of federalist social policy, and even more cautiously to other areas of law. Cash assistance has often been a particularly fraught area of law, politics, and policy—and controversies over the substance of the program might make its federalist design difficult to disentangle from the vagaries of racialized attitudes and partisan politics.

Nonetheless, TANF is a particularly important case study because it was born out of an attempt to devolve authority to the states in order to reform the substance of the program. Before looking at the consequences of those changes for the program (and for theories of federalism), it would be useful to briefly recount how states, in effect, led the nation in reforming welfare.

28. 7 U.S.C. § 2025 (2012).

29. *Id.*; see also U.S. DEP’T OF AGRIC., SNAP ADMINISTRATIVE COSTS, AUDIT REPORT 27601-0003-22 (2016), <https://www.usda.gov/oig/webdocs/27601-0003-22.pdf> [<https://perma.cc/DZ4W-D7XT>] (“FNS funds the full cost of SNAP benefits and generally reimburses the States for 50 percent of their administrative costs.”).

30. See *Earned Income Tax Credit (EITC)*, IRS (Nov. 9, 2017), <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit> [<https://perma.cc/9L2P-KZ72>].

31. ROBERT JAY DILGER & EUGENE BOYD, CONG. RESEARCH SERV., R40486, BLOCK GRANTS: PERSPECTIVES AND CONTROVERSIES (2014).

32. See *infra* section I.D.

II. THE CREATION (AND SUBSEQUENT DETERIORATION) OF TANF

In Part II, I briefly detail the drive to replace Aid to Families with Dependent Children (AFDC) with TANF in 1996 before explaining the devolutionary design written into TANF and how the block grant mechanism guaranteed the program's deterioration. By moving TANF to a block grant structure, Congress effectively mandated benefit cuts and made this federal funding particularly susceptible to repurposing by cash-strapped states. This structure, in turn, undermines the program's potential to shield families from extreme poverty and leaves millions of vulnerable Americans without income assistance.

A. *The Personal Responsibility and Work Opportunity Reconciliation Act of 1996*

There is a plethora of scholarship on the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), including comprehensive econometric evaluations, ethnographic studies of former recipients, and longitudinal studies of the 1996 legislation.³³ This account focuses on its federalist structure and the role of states in designing the legislation.

AFDC was intended to provide financial assistance to needy children. Initially it did not provide assistance for a parent or other caretaker in an eligible child's household.³⁴ Over the next fifty years, AFDC eligibility expanded to cover caretakers of needy children, including unemployed parents.³⁵ As those families with deceased or disabled caretakers became eligible in the 1980s for a more generous benefit through Social Security, the remaining recipients of AFDC were predominantly single mothers and their children. Yet, it was the increase of the AFDC caseload just at the time that states were attempting to reduce expenditures that led to an

33. See, e.g., JEFFREY GROGGER & LYNN A. KAROLY, *WELFARE REFORM: EFFECTS OF A DECADE OF CHANGE* 5 (2005) (describing their approach as "extend[ing] the traditional economic model of welfare incentives to analyze the effects of recent reforms on outcomes such as welfare use, employment, labor supply, and income"); RON HASKINS, *WORK OVER WELFARE: THE INSIDE STORY OF THE 1996 WELFARE REFORM LAW* xii (2006) (in which the author describes himself as having "help[ed] develop, draft, and guide the welfare reform bill through Congress").

34. See JANET M. CURRIE, *THE INVISIBLE SAFETY NET* 18 (2006); *Aid to Families with Dependent Children: The Baseline*, U.S. DEP'T OF HEALTH & HUMAN SERVS., <http://aspe.hhs.gov/HSP/AFDC/afdcbase98exhib.htm> [<https://perma.cc/VS35-9UB4>] [hereinafter *Aid to Families*].

35. In 1950, the federal government added a provision for maintenance costs of the caretaker of the eligible child. In 1961, the child of an unemployed parent and that parent (referred to as AFDC-Unemployment) could receive assistance under AFDC.

explosion of state-level experimentation.

The AFDC caseload increased into the 1980s, spurring the passage of the Family Support Act (FSA) of 1988.³⁶ The FSA required most welfare recipients to enter the labor force or engage in education or training, unless they had children under the age of three.³⁷ Such a policy was easier mandated than done. Dramatically increased caseloads meant increased expenditures, all at a time when state revenues were shrinking due to the 1991 recession.³⁸ Unlike the federal government, which could avoid raising taxes or decreasing spending simply by adding to the national debt, most state governments were legally required to balance their budgets.³⁹ As a result, states applied for waivers from AFDC program rules under section 1115 of the Social Security Act.⁴⁰ From 1988 to 1992, the Bush administration granted permission to twelve states, including then-Governor Bill Clinton's Arkansas, to waive AFDC requirements.⁴¹ States used the waivers to experiment in various ways, including introducing higher earnings disregards and asset tests. However, most involved increased uses of sanctions, the introduction of family caps, and other means by which to push recipients off the welfare rolls, all of which would reduce expenditures.⁴² By 1994, the National Governors' Association reported that forty-eight states had implemented welfare reform measures beyond those required under the federal law.⁴³

President Clinton entered the White House in 1993 with a campaign pledge "to end welfare as we know it."⁴⁴ Clinton had raised the issue of welfare reform so often on the campaign trail that eight days after his

36. Pub. L. No. 100-485, 102 Stat. 2343 (1988).

37. *Id.* § 301.

38. JAMES P. ZILIAK, *WELFARE REFORM AND ITS LONG-TERM CONSEQUENCES FOR AMERICA'S POOR* 3 (2009).

39. Nicholas Bagley, *Federalism and the End of Obamacare*, 127 YALE L.J. F. 1, 9–10 (2017) ("With the exception of Vermont, the states are legally obliged to balance their budgets every year.").

40. 42 U.S.C. § 1315 (2012); *see also* Joel F. Handler, *Welfare-to-Work: Reform or Rhetoric?*, 50 ADMIN. L. REV. 635, 638 n.20 (1998).

41. *See* Michael Wiseman, *Welfare Reform in the States: The Bush Legacy*, 15 FOCUS 18 (1993), <https://irp.wisc.edu/publications/focus/pdfs/foc151b.pdf> [<https://perma.cc/3NNB-TTDM>].

42. GROGGER & KAROLY, *supra* note 33 at 125–28; *see also* Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J.L. & GENDER 151, 165–67 (2006).

43. NAT'L GOVERNORS' ASS'N, FINAL REPORT: THE NATIONAL GOVERNORS' ASSOCIATION SURVEY OF STATE WELFARE REFORMS (1994).

44. *See Bill Clinton in 1992 Ad: "A Plan to End Welfare as We Know It,"* WASH. POST (Aug. 30, 2016, 11:31 AM), https://www.washingtonpost.com/video/politics/bill-clinton-in-1992-ad-a-plan-to-end-welfare-as-we-know-it/2016/08/30/9e6350f8-6ee0-11e6-993f-73c693a89820_video.html [<https://perma.cc/BG9J-7ZTS>].

inauguration, when asked to name Clinton's most important promises, voters' third most common response was welfare reform.⁴⁵ The Clinton Administration had signaled during the campaign, the transition, and its first years in office that an overhaul of social assistance was a domestic priority.

Despite the constant rhetoric of welfare reform during the campaign, the Clinton Administration was hampered by budget rules and spending caps in its first year in office. Initially, the Administration proposed a welfare reform package in its 1993 budget legislation.⁴⁶ The Clinton welfare reform proposal would have made AFDC a temporary benefit of two years and moved recipients into work with subsidies for job training, child care, and transportation costs.⁴⁷ The Budget Enforcement Act of 1990, however, limited the Clinton Administration in its options to reform entitlement programs, including AFDC, by requiring any proposed additional spending on a program be offset by cuts within that program or by other cuts in entitlement spending or by new taxes.⁴⁸ The Clinton Administration needed to raise taxes in 1993 if it were to meet its deficit reduction targets and finance new spending on various initiatives. Initially, Clinton's welfare reform proposal was included in the 1993 budget, but it was removed at the final internal meeting in the White House before the administration submitted the budget to Congress, apparently over concerns that the \$3 billion cost estimate would be significantly higher and reluctance to exceed the target of \$140 billion in new spending.⁴⁹ By contrast, the Administration retained the full amount of \$27 billion to make good on Clinton's campaign promise of expanding the EITC.⁵⁰

Scholars agree that the bill signed by President Clinton three years later marked a radical shift in American social assistance policy.⁵¹ PRWORA ended the federal entitlement program, AFDC, and replaced it with

45. BOB WOODWARD, *THE AGENDA* 109 (1994). The first two were job creation and healthcare reform. *Id.*

46. *Address Before a Joint Session of Congress on Administration Goals*, AM. PRESIDENCY PROJECT (Feb. 17, 1993), <http://www.presidency.ucsb.edu/ws/?pid=47232> [<https://perma.cc/K46M-HTRZ>].

47. *Id.*

48. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (1990).

49. See Stephen D. Sugarman, *Welfare Reform and the Cooperative Federalism of America's Public Income Transfer Programs*, 14 YALE L. & POL'Y REV. 123, 145 (1996) (citation omitted).

50. WOODWARD, *supra* note 45, at 126.

51. See, e.g., Joe Soss & Sanford F. Schram, *A Public Transformed? Welfare Reform and Policy Feedback*, 101 AM. POL. SCI. REV. 111, 112-13 (2007) (describing welfare policy as a tempting target for "Democrats looking for a way to change the political terrain").

TANF.⁵² TANF, like AFDC, is a means-tested program, but there the similarities end.⁵³ TANF marked a significant departure from AFDC in three fundamental ways: the elimination of the entitlement; the funding mechanism; and the eligibility criteria, including the introduction of time limits, family caps, sanctions, and the citizen/non-citizen distinction.⁵⁴

The most striking item of the American welfare reform legislation was the elimination of the legal entitlement to federal cash assistance. Under the new law, the fifty state governments were freed from their commitment to provide cash assistance to needy families: no individual could sue the state for failing to provide a benefit for which that individual is legally eligible.⁵⁵

In terms of funding, federal cash assistance went from a matching formula that was an open-ended commitment on the part of the national government under AFDC to a pre-appropriated block grant for each state.⁵⁶ That grant was calculated to equal the highest level of annual spending for each state in the three years prior to 1996.⁵⁷ Yet any funds saved at the state level by reducing caseloads would be released to the states to be used for any other purpose⁵⁸—a feature common in other block grants because of the relatively lax reporting requirements imposed on states by the federal government. This feature provided a further financial incentive for states to reduce the number of people claiming TANF. Under PRWORA, states could not reduce the amount they spent on TANF by more than 25% of what they spent in 1994.⁵⁹

52. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105, 2112–61 (1996) (creating TANF block grants in place of AFDC).

53. Jacob S. Hacker, Suzanne Mettler & Joe Soss, *The New Politics of Inequality: A Policy-Centered Perspective*, in REMAKING AMERICA, *supra* note 13, at 3 (claiming that PRWORA “redefined the purpose of public assistance and ended entitlements for the poorest Americans”).

54. Under AFDC, some states were able to apply for waivers from the federal government that would allow them to implement some of these measures; but these waivers failed to reach the scale or scope of the PRWORA reforms.

55. Michael Wiseman, *Welfare in the United States*, in THE WELFARE WE WANT? THE BRITISH CHALLENGE FOR AMERICAN REFORM 25, 37 (2003) (“No feature of recent developments in the US more dramatically contrasts with European social assistance concepts than the provision in the PRWORA that eliminated the *right* of categorically eligible families to obtain cash assistance.” (emphasis in original)).

56. *Aid to Families*, *supra* note 34; see also LIZ SCHOTT, LADONNA PAVETTI & IFE FINCH, CTR. ON BUDGET & POLICY PRIORITIES, HOW STATES HAVE SPENT FEDERAL AND STATE FUNDS UNDER THE TANF BLOCK GRANT (2012), <https://www.cbpp.org/research/how-states-have-spent-federal-and-state-funds-under-the-tanf-block-grant> [<https://perma.cc/G4SG-FEEE>].

57. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193 § 403(a), 110 Stat. 2105 (1996).

58. SCHOTT, PAVETTI & FINCH, *supra* note 56.

59. Wiseman, *supra* note 55, at 36.

In terms of eligibility criteria, TANF attached several conditions to the receipt of benefits that were not present pre-PRWORA.⁶⁰ Adults receiving TANF were required to work after two years of receiving the benefit. Furthermore, once individuals received TANF assistance for five years, they were banned from receiving further benefits for life.⁶¹ According to the federal government's 2000 Green Book, the authoritative guide to benefits rules, states could exempt 20% of their caseload from this lifetime ban, but the legislation also required "a specified and rising percentage of the total caseload to engage in work activities."⁶²

In terms of sanctions, if any adult recipient of TANF did not engage in work, PRWORA required the state to either reduce aid to the family in proportion to the period of work inactivity or to cut off aid altogether.⁶³ States could also reduce a family's benefit "by an amount the State considers appropriate if a family member fails" to adhere to an individual responsibility plan, unless with good cause, that he or she has signed.⁶⁴

On top of these new conditions, states were given further discretion in the ability to deny benefits or impose sanctions. First, states could render mothers under the age of eighteen and their children ineligible for TANF unless they live with an adult.⁶⁵ Second, states were allowed to impose family caps.⁶⁶ Family cap policies required that benefits would not increase if an additional child was born outside marriage while the mother was receiving benefits.⁶⁷ Also known as the "child exclusion policy," the family cap policy repealed the standard calculation in which assistance for parents is determined by how many children that parent has.⁶⁸ In effect,

60. See 45 C.F.R. § 261.2 (2006).

61. *Id.*

62. COMM. ON WAYS & MEANS, 106TH CONG., BACKGROUND MATERIAL AND DATA ON PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS (GREEN BOOK) 353 (Comm. Print 2000) [hereinafter GREEN BOOK].

63. Federal law exempted a single parent caring for a child under the age of six who could not work because he or she was unable to obtain child care. The legislation did not define the "pro rata" reduction nor did the regulations offer any guidance. As of 2000, about one-third of states ended the benefit after the first violation. *Id.* at 358.

64. *Id.*

65. See *Major Provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, OFF. FAMILY ASSISTANCE, U.S. DEP'T OF HEALTH AND HUMAN SERVS. (Dec. 16, 1996), <https://www.acf.hhs.gov/ofa/resource/law-reg/finalrule/aspesum> [<https://perma.cc/5BYN-C4ZP>] ("Unmarried teen parents must stay in school and live at home or in an adult-supervised setting.").

66. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-01-924, MORE RESEARCH NEEDED ON TANF FAMILY CAPS AND OTHER POLICIES FOR REDUCING OUT-OF-WEDLOCK BIRTHS (2001).

67. *Id.* at 2, 5.

68. See SHELLEY STARK & JODIE LEVIN-EPSTEIN, CLASP, EXCLUDED CHILDREN: FAMILY CAP IN A NEW ERA (1999), <https://www.clasp.org/sites/default/files/public/resources-and-publications/>

if a mother is raising two children in poverty and then has another child while on welfare, the government will not increase the amount of cash assistance given to that family. Twenty-three states adopted the policy following the enactment of the 1996 legislation.⁶⁹ Finally, unless a state opted out by changing their state law, the Welfare Reform Act banned felons as well as probation or parole violators convicted of a drug-related felony from receiving cash assistance.⁷⁰

PRWORA also dramatically restricted legal immigrants' eligibility for TANF and other federal means-tested benefits.⁷¹ Legal immigrants who arrived in the country after PRWORA was signed into law were barred from TANF, Food Stamps, non-emergency Medicaid, Supplemental Security Income, and the state-based Children Health Insurance Program (CHIP).⁷² In regards to TANF, states could create a substitute program for immigrant families to replace the terminated benefits from federal cash assistance, but they could only use funds from their block grant for this purpose if these families had lived in the United States for at least five years.⁷³ For the first five years of residence, states would have to use their own funds. Twenty-eight states responded to this elimination of federal eligibility by creating their own programs, but those programs often reflected tightened conditionality including requirements for residency and naturalization as well as time limits.⁷⁴ Several states have chosen to continue to allow immigrant families to receive TANF or SNAP during their first five years of residency.⁷⁵ As one researcher has written, "PRWORA institutionalized the concept of immigrant exceptionalism—

archive/0030.pdf [https://perma.cc/W29G-LRRY].

69. *Id.* at 1 ("[Twenty-three] states have established some type of family cap or child exclusion policy.").

70. GREEN BOOK, *supra* note 62, at 355.

71. See generally MICHAEL FIX & JEFFREY PASSEL, URBAN INST., THE SCOPE AND IMPACT OF WELFARE REFORM'S IMMIGRANT PROVISIONS 2 (2002), webarchive.urban.org/Uploadedpdf/410412_discussion02-03.pdf [https://perma.cc/974R-353C].

72. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996); see also CONG. BUDGET OFFICE, FEDERAL BUDGETARY IMPLICATIONS OF THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996, at 26 (1996), <https://www.cbo.gov/publication/14858> [https://perma.cc/LN3C-AUW2] (detailing how "Title IV [of PRWORA] limits the eligibility of legal aliens for public assistance programs").

73. GREEN BOOK, *supra* note 62, at 355.

74. KAREN C. TUMLIN & WENDY ZIMMERMAN, URBAN INST., IMMIGRANTS AND TANF: A LOOK AT IMMIGRANT WELFARE RECIPIENTS IN THREE CITIES (2003), <http://webarchive.urban.org/publications/310874.html> [https://perma.cc/TJ9F-8VDB].

75. *Mapping Public Benefits for Immigrants in the States*, PEW CHARITABLE TRUSTS (Sept. 24, 2014), <http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2014/09/mapping-public-benefits-for-immigrants-in-the-states> [https://perma.cc/KW8V-44E7].

treating noncitizens differently from similarly situated citizens—to a new and unprecedented degree in social welfare policy.”⁷⁶

The Balanced Budget Act of 1997 restored access to Supplemental Security Income and Medicaid for elderly and disabled immigrants.⁷⁷ This restoration of benefits was followed by the Agricultural Research, Extension, and Education Reform Act (AREERA) of 1998, which restored Food Stamp eligibility for immigrant children living in the United States prior to the passage of PRWORA.⁷⁸ Immigrant children and their parents were still barred from accessing TANF, and any children and parents living in the United States following August 22, 1996 were barred from collecting Food Stamps.⁷⁹ As the government's Green Book stated, “[t]he basic policy laid out by the 1996 welfare law remains essentially unchanged for noncitizens entering after its enactment.”⁸⁰

In addition to its overhaul of federal cash assistance, the 1996 PRWORA legislation also consolidated federal spending on child care into the Child Care and Development Block Grant and added an additional \$4 billion.⁸¹ Yet AFDC had required states to guarantee child care to benefit recipients who needed it because of labor market participation or education.⁸² TANF had no such guarantee.⁸³

B. The Role of States in Enacting Welfare Reform

Many scholars insist that policymakers typically have a set of options to confront a public problem, and that those options are often variations on past or existing policies.⁸⁴ Yet, one of the striking characteristics of this

76. KAREN C. TUMLIN & WENDY ZIMMERMAN, URBAN INST., PATCHWORK POLICIES: STATE ASSISTANCE FOR IMMIGRANTS UNDER WELFARE REFORM 5 (1999), <https://www.urban.org/sites/default/files/publication/69586/309007-Patchwork-Policies-State-Assistance-for-Immigrants-under-Welfare-Reform.PDF> [https://perma.cc/F8JY-SFKK].

77. Balanced Budget Act, Pub. L. No. 105-33, 111 Stat. 251 (1997).

78. Agricultural Research, Extension, and Education Reform Act of 1998, Pub. L. No. 105-185, 112 Stat. 523 (1998).

79. Pub. L. No. 105-33; Pub. L. No. 105-185.

80. GREEN BOOK, *supra* note 62, at 1372.

81. OFFICE OF CHILD CARE, U.S. DEP'T OF HEALTH AND HUMAN SERVS., “FUN” DAMENTALS OF CCDF ADMINISTRATION (2013), https://www.acf.hhs.gov/sites/default/files/occ/fundamentals_of_ccdf_administration.pdf [https://perma.cc/P57N-HRFS].

82. R. KENT WEAVER, ENDING WELFARE AS WE KNOW IT 77 (2000).

83. *See* KAREN SCHULMAN & ABBIE STARKER, NAT'L WOMEN'S L. CTR., TEMPORARY ASSISTANCE FOR NEEDY FAMILIES AND CHILD CARE ASSISTANCE: A WEAKENED SAFETY NET FOR FAMILIES (2016), <https://nwlc.org/wp-content/uploads/2016/11/TANF-Child-Care-Fact-Sheet-11.4.16.pdf> [https://perma.cc/9PDH-ECEK].

84. PAUL SPICKER, POLICY ANALYSIS FOR PRACTICE: APPLYING SOCIAL POLICY (2006).

period in American social welfare policy is the introduction of unprecedented approaches to cash assistance, including the introduction of family caps, lifetime bans, sanctions, and the citizen/non-citizen distinction. Some have sought to explain the introduction of these new policies as the result of Congressional Republicans rewriting the terms of welfare reform in the 1990s.⁸⁵ While their majorities in Congress certainly did empower Republican members to propose reforms that diverged from previous changes to cash assistance, these reforms still had to come from somewhere. The source of these new policies was not singular, but rather, from various states, most under the leadership of Republican Governors, which had obtained waivers from the federal government relieving them of the national standards of AFDC and permitting statewide experimentation. The Governors not only provided policy alternatives to the federal cash assistance scheme, which put additional pressure on national reform efforts, but they also actively lobbied for PRWORA itself.⁸⁶ Understanding how this waiver system came about and why the states experimented in the ways they did helps explain the peculiar character of welfare.⁸⁷

The use of time limits, family caps, and the citizen/non-citizen distinction can be traced to reforms originating in Wisconsin, New Jersey, and California, respectively. The emphasis on time limits and a “work-first approach” dates to Wisconsin’s efforts and others in the 1980s and 1990s.⁸⁸ Wisconsin has been known for policy experimentation since the beginning of the twentieth century; welfare was no exception.⁸⁹ Indeed,

85. See, e.g., WEAVER, *supra* note 82, at 252–93 (describing how the “electoral earthquake” ushering in a new GOP majority in both houses created a “new dynamic” in welfare reform).

86. See Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077, 1105–06 (2014) (characterizing Governors’ efforts to convert cash assistance into a block grant as “at once a push to devolve power to the states and a push to move the substantive commitments of welfare policy in a Republican direction” (citation omitted)); Bulman-Pozen & Gerken, *supra* note 16, at 1275–76 (recounting that “states like Michigan and Wisconsin played a powerful role in reshaping national welfare policy” and that “[m]ost of their goals were realized when Congress passed [PRWORA]”); Russell A. Miller, *Clinton, Ginsburg, and Centrist Federalism*, 85 IND. L.J. 225, 243–46 (2010) (ascribing the states “a significant role in the negotiations for and enactment of [PRWORA]”).

87. See generally HASKINS, *supra* note 33, at 20–36 (describing the source of welfare reform provisions); Miller, *supra* note 86, at 243–46 (“State autonomy was both the essential driver and aim of [the block grant structure].” (citations omitted)).

88. See Robert Walker et al., *Successful Welfare-to-Work Programs: Were Riverside and Portland Really that Good?*, 22 FOCUS 1, 11 (2003), <https://www.irp.wisc.edu/publications/focus/pdfs/foc223.pdf> [<https://perma.cc/RD35-GASQ>]; Pamela A. Holcomb et al., *Work First and Other Work-Oriented Strategies in Five States*, U.S. DEP’T OF HEALTH & HUMAN SERVS. (June 1, 1998), <https://aspe.hhs.gov/basic-report/building-employment-focused-welfare-system> [<https://perma.cc/EW3S-VG4H>].

89. See generally JAMES K. CONANT, *WISCONSIN POLITICS AND GOVERNMENT: AMERICA’S*

one study of welfare reform in Wisconsin counted seventeen different regulations or programs modifying AFDC in the period from 1979 to 1994.⁹⁰ Beginning with the Work Experience and Job Training (WEJT) program in 1986, Wisconsin required full participation in work-related activities for any recipient with children aged three months or older. Culminating in “Work, Not Welfare” in 1993, Wisconsin limited AFDC benefits to twenty-four cumulative months within a four-year period and ensured that benefit receipt is conditional on participation in work-related activities.⁹¹

In 1967, Congress considered, but ultimately rejected, a family cap provision.⁹² However, a family cap did pass in January 1992 in New Jersey.⁹³ Despite being an affluent state with generous benefit levels and Democratic leadership, the state legislature passed the family cap law as part of their Family Development Plan (FDP), which restructured the state’s implementation of AFDC.⁹⁴ While the regulation had not been proven to have any effect on recipients’ behavior, the law received national attention.⁹⁵

Before PRWORA enacted bans on benefits for non-citizens, California had debated and eventually approved a two-tiered benefit system for citizens and non-citizens.⁹⁶ Following the 1992 election, the California state legislature enacted a two-tier welfare payment strategy, drastically reducing access for immigrants.⁹⁷ In 1994, the “Save Our State” initiative, eliminating illegal immigrants’ access to health, education and welfare programs, was approved in a state-wide referendum.⁹⁸ Unlike the California referendum that excluded illegal immigrants, the PRWORA

LABORATORY OF DEMOCRACY (2006).

90. Thomas J. Corbett, *Welfare Reform in Wisconsin*, in *THE POLITICS OF WELFARE REFORM* 19, 23–26 (Donald F. Norris & Lyke Thompson eds., 1994) [hereinafter *WELFARE REFORM*].

91. *See id.* at 25–26.

92. Patricia Donovan, *Does the Family Cap Influence Birthrates? Two New Studies Say ‘No’*, GUTTMACHER INST. (Feb. 1, 1998), <https://www.guttmacher.org/gpr/1998/02/does-family-cap-influence-birthrates-two-new-studies-say-no> [<https://perma.cc/6K53-C2V9>].

93. Ted George Goertzel & John Hart, *New Jersey’s \$64 Question*, in *WELFARE REFORM*, *supra* note 90, at 109.

94. *Id.*

95. *See generally id.*

96. *See* Jenifer M. Bosco, Note, *Undocumented Immigrants, Economic Justice, and Welfare Reform in California*, 8 GEO. IMMIGR. L.J. 71, 71–75 (1994).

97. *See generally id.*

98. *See generally id.*; Jonathan Freedman, *Save Our State? It’s More Like Spite Our State*, L.A. TIMES (July 19, 1994), http://articles.latimes.com/1994-07-19/local/me-17266_1_illegal-immigrants [<https://perma.cc/FK4A-JYVE>].

provision focused on legal immigrants. Still, California is considered to be the first state government to enact the proposal to reduce expenditure on cash assistance by restricting access to immigrants.

The experience of state-level experimentation with AFDC drastically expanded the range of policy options that were considered at the national level.⁹⁹ Congressional Republicans drew from this explosion of policy innovation when drafting a welfare reform proposal to compete with the one written by the Clinton Administration. As a result, in a divided government, the legislation that ultimately passed in 1996 reflected a combination of proposals from both the President and Congress, but those proposals made by Congress found their policy precedent in state-level experimentation that began decades before.¹⁰⁰

Some scholars who have moved beyond explanations of the source material for TANF to examine TANF's record often emphasize other actions by states, such as tightening eligibility for immigrant families,¹⁰¹ setting more parsimonious asset and time limits, and recent proposals to drug test TANF applicants.¹⁰² States certainly enjoyed far greater discretion to determine eligibility than they had pre-PRWORA.¹⁰³ States have reduced the amount of time a poor family can receive cash assistance over their lifetimes. The federal statute requires that no family can receive assistance for more than twenty-four consecutive months and no family

99. See Sugarman, *supra* note 49, at 147 (arguing that Congress devolved authority to lower visibility of some controversial reforms “by passing off the responsibility elsewhere, these legislators are hoping that the states, or at least some of them, will do the sort of dirty work that Congress dare not do”).

100. See Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 66 (2010) (“States can use federal welfare monies to build a program that will ultimately serve as a model for dismantling the federal system, as did Michigan and Wisconsin.”).

101. See generally Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367 (2013); Rick Su, *The States of Immigration*, 54 WM. & MARY L. REV. 1339 (2013); Michael J. Wishnie, *Laboratories of Bigotry: Devolution of the Immigration Power, Equal Protection, and Federalism*, 76 N.Y.U. L. REV. 493 (2001).

102. *Lebron v. Sec’y of Fla. Dep’t of Children & Families*, 710 F.3d 1202, 1203 (11th Cir. 2013); see generally GENE FALK, CONG. RESEARCH SERV., R43634, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF): ELIGIBILITY AND BENEFIT AMOUNTS IN STATE TANF CASH ASSISTANCE PROGRAMS 5 (2014); SIGNE-MARY MCKERNAN & MICHAEL WAYNE SHERRADEN, ASSET-BUILDING AND LOW-INCOME FAMILIES 164 (2008); Philippa M. Guthrie, *Drug Testing and Welfare: Taking the Drug War to Unconstitutional Limits?*, 66 IND. L.J. 579 (1991).

103. Shep Melnick, *Entrepreneurial Litigation: Advocacy Coalitions and Strategies in the Fragmented American Welfare State*, in REMAKING AMERICA, *supra* note 13, at 58 (“Not until 1996—nearly thirty years after the first legal assault on AFDC practices—did Congress hand control of eligibility standards back to the states.”); see also MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960–73, at 81–98 (1993) (recounting how newly funded legal aid lawyers won several cases that limited state discretion).

can receive cash assistance for sixty months, regardless of whether they are consecutive. But many states have shortened that lifetime limit.¹⁰⁴ States have also imposed asset limits on TANF recipients, kicking families off the program once they have assets valued at as little as \$2,000.¹⁰⁵ Some states include cars in that asset test.¹⁰⁶ By setting a limit on the amount of savings a needy family can accrue or preventing them from owning a car, states undermine one of the purported purposes of TANF: encouraging families to become self-sufficient. Similarly, states have also reduced education and training services for TANF parents.¹⁰⁷ In the last few years, states have introduced drug testing as an additional requirement for families to receive TANF.¹⁰⁸ Federal courts have struck down these new policies as violations of the Fourth and Fourteenth Amendments.¹⁰⁹ And the policies that states implemented before the court challenges were found to have no effect on a population that has lower rates of drug use than the general population.¹¹⁰ In light of these state policies restricting eligibility, shortening time limits, and reducing benefits, it is not shocking that TANF caseloads rose only by 15% in the

104. See MARY FARRELL ET AL., LEWIN GRP. & MDRC, *WELFARE TIME LIMITS: AN UPDATE ON STATE POLICIES, IMPLEMENTATION, AND EFFECTS ON FAMILIES* (2008), https://www.mdrc.org/sites/default/files/full_609.pdf [<https://perma.cc/DE3B-CF9E>]; Kyoung Hag Lee, *Effect of Lifetime Limits and Differences Between TANF Leavers Who Had Reached Their Lifetime Limits and Those Who Had Exited Voluntarily*, 2 POVERTY & PUB. POL'Y 27, 29 (2010).

105. See FALK, *supra* note 102, at summary.

106. See Laura Pereya, *TANF's Counterproductive Asset Tests: Eliminating the Tests Will Help Families While Saving States Money*, CTR. FOR AM. PROGRESS (May 6, 2010, 9:00 AM), <https://www.americanprogress.org/issues/poverty/news/2010/05/06/7846/tanfs-counterproductive-asset-tests/> [<https://perma.cc/8DMF-GXT4>].

107. See ELIZABETH LOWER-BASCH, CTR. FOR LAW & SOC. POL'Y, *EDUCATION AND TRAINING FOR TANF RECIPIENTS: OPPORTUNITIES AND CHALLENGES UNDER THE FINAL RULE 3* (2008), <http://www.policyarchive.org/handle/10207/13832> [<https://perma.cc/KG6K-2GB4>].

108. *Drug Testing for Welfare Recipients and Public Assistance*, NAT'L CONF. OF STATE LEGIS. (Mar. 24, 2017), <http://www.ncsl.org/issues-research/human-services/drug-testing-and-public-assistance.aspx> [<https://perma.cc/A6T3-Q7QD>].

109. See, e.g., *Lebron v. Sec'y of Fla. Dep't of Children & Families*, 710 F.3d 1202, 1203 (11th Cir. 2013) (striking down Florida statute drug-testing all TANF applicants); see generally Guthrie, *supra* note 102.

110. CLASP, *TANF POLICY BRIEF: RANDOM DRUG TESTING OF TANF RECIPIENTS IS COSTLY, INEFFECTIVE AND HURTS FAMILIES* (2013), <https://www.clasp.org/resources-and-publications/publication-1/520.pdf> [<https://perma.cc/FN34-Y343>]; Lavanya Mohan, *Few TANF Applicants Test Positive for Drug Use; Testing Is Costly and Ineffective*, CLASP (July 29, 2013), <http://www.clasp.org/issues/temporary-assistance/in-focus/few-tanf-applicants-test-positive-for-drug-use-testing-is-costly-and-ineffective> [<https://perma.cc/8VGD-Q8HJ>]; see also ASPE, *DRUG TESTING WELFARE RECIPIENTS: RECENT PROPOSALS AND CONTINUING CONTROVERSIES* (2011), <http://aspe.hhs.gov/hsp/11/DrugTesting/ib.shtml> [<https://perma.cc/8YNG-3MJW>].

deepest economic crisis since the Great Recession.¹¹¹

To a large extent, state changes to TANF are hard to detect, analyze, and compare. The administration of public benefit programs depends on sophisticated data analysis,¹¹² but states often lack the resources to collect data, let alone analyze it.¹¹³ The label “laboratories of democracy” is misleading in the context of TANF because neither the states nor the federal government systematically evaluate state experimentation in TANF.¹¹⁴ Then there is the phenomenon of sub-delegation to counties and private contractors.¹¹⁵ Other scholars have pointed out that this idea of democratic experimentation is not only inherent in state-level innovation, it might be better served by centralized programming.¹¹⁶ Others have

111. See Jason DeParle, *Welfare Limits Left Poor Adrift as Recession Hit*, N.Y. TIMES (Apr. 7, 2012), <http://www.nytimes.com/2012/04/08/us/welfare-limits-left-poor-adrift-as-recession-hit.html?mcubz=0> [https://perma.cc/5MQT-66UM] (“Compared with the 1990s peak, the national welfare rolls are still down by 68 percent. Just one in five poor children now receives cash aid, the lowest level in nearly 50 years.”).

112. David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CALIF. L. REV. 393, 458–59 (2008); see also *Welfare Reform: A New Conversation on Women and Poverty: Hearing Before the Comm. on Fin. U.S. S.*, 111th Cong. 11–13 (2010) [hereinafter *Welfare Reform*] (statement of Gordon L. Berlin, President of MDRC) (imploping Congress to focus on collecting more data from the states).

113. David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541, 545 (2008) (offering a “critique of decentralized participatory decision making” based on the lack of consensus on the nature of the problems, reliable metrics, and significant resource constraints and arguing instead for a centralized policymaking); see also Wendy A. Bach, *Governance, Accountability, and the New Poverty Agenda*, 2010 WIS. L. REV. 239, 268 n.118 (quoting Super, *supra* note 113, at 556) (“TANF is characterized by devolution and abandonment of the safety net.”).

114. See David Lowery, Virginia Gray & Frank R. Baumgartner, *Policy Attention in State and Nation: Is Anyone Listening to the Laboratories of Democracy?*, 41 PUBLIUS 286, 304 (2010) (finding “little evidence that changes in state policy agendas in the aggregate influence national patterns of policy attention”); Barbara Vobejda & Judith Havemann, *States’ Welfare Data in Disarray*, WASH. POST (Apr. 13, 1998), <http://www.washingtonpost.com/wp-srv/politics/special/welfare/stories/wf041398.htm> [https://perma.cc/29BG-JRSV].

115. Others have documented this phenomenon. See, e.g., Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 SETON HALL L. REV. 573, 576–77 (2004) (arguing that state and local governments “lack the institutional capacity and, oftentimes, the proper incentives to bear primary responsibility for ensuring the successful transition of America’s dependent, welfare population to the world of work and personal responsibility”); see also Christine N. Cimini, *The New Contract: Welfare Reform, Devolution, and Due Process*, 61 MD. L. REV. 246, 250–51 (2002) (documenting how states have devolved further programmatic responsibility to counties); Thomas L. Gais & Cathy M. Johnson, *Welfare Reform, Management Systems, and Their Implications for Children*, 60 OHIO ST. L.J. 1327, 1346 (1999) (describing state practice of sub-delegating administrative and policymaking authority over welfare services).

116. See Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483, 498 (1991) (arguing that “if experimentation is our chief desideratum, a purely pyramidal government structure may well be preferable, enabling central planners to shape and reshape government

argued that experimentalism presumes both reliable metrics with which to measure the success or failure of various state efforts as well as a consensus among policymakers about which metrics should be used.¹¹⁷ In giving states broad discretion without conducting systematic research on the effects of program changes on former and current recipients, the federal government has let states alter their TANF programs in a vacuum.¹¹⁸ Indeed, the federal government does not even require the states to report how many TANF families each state is serving through non-cash programs and benefits.¹¹⁹ No wonder states' reports are uneven and underspecified.¹²⁰

C. *The TANF Block Grant: Devolution as Statutized Deterioration*

In light of what welfare reform actually was and the role of states in it, it is easier to grasp the consequences of that new devolutionary design for the program. As mentioned above, PRWORA did away with using the matching formula for cash assistance where the federal government would reimburse states anywhere from 1:1 to more than 4:1 of their expenditures on cash assistance.¹²¹ Typically, the reimbursement rate would be higher for states with lower per-capita incomes. PRWORA replaced that open-ended commitment on the part of the national government under AFDC to a pre-appropriated TANF block grant for each state, equal to the highest

boundaries and policies for more carefully controlled experiments"); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 923 (1994).

117. See Super, *supra* note 113, at 556 (arguing that without "reliable metrics" that "can be readily agreed upon and implemented, for measuring policies' effectiveness . . . local policy variations will be experiments in name only").

118. See Michaels, *supra* note 115, at 576 (cautioning that "significant problems emerge when the federal government, ostensibly insistent on meeting certain objective goals, nevertheless abdicates its authority and responsibility for overseeing the implementation and for securing the success of the biggest restructuring of American welfare policy in generations").

119. See FALK, *supra* note 102, at 1 (concluding that "TANF basic assistance accounts for about 28.6% of all TANF expenditures").

120. See DAVID KASSABIAN ET AL., URBAN INST., WELFARE RULES DATABASE: STATE TANF POLICIES AS OF JULY 2010, at 3 (2011), <https://www.urban.org/research/publication/welfare-rules-database-state-tanf-policies-july-2010> [<https://perma.cc/VLP2-Z8RK>] (describing how TANF State Plans' "level of detail varies considerably across states . . . offer[ing] insufficient information to completely understand the details of eligibility, benefit computation, and client requirements" and that while "states are expected to notify the federal government if any of their choices change after the plan is submitted, they are not required to do so"). As of this writing, the State of Illinois's most recent TANF report is the previous report with some track changes. See *Plan for Temporary Assistance for Needy Families*, ST. OF ILL. (Jan. 1, 2017), <http://www.dhs.state.il.us/page.aspx?item=87890> [<https://perma.cc/L25D-L8KB>].

121. See FALK, *supra* note 102, at 6.

level of annual spending for each state in the three years prior to 1996.¹²² Crucially, any funds saved at the state level by reducing caseloads would be released to the states to be used for any other purposes, providing a strong financial incentive for states to reduce the number of people claiming TANF.¹²³

In an effort to set a floor below which no state could reduce its funding of TANF, Congress prohibited states from reducing the amount they spent on TANF by more than 25% of what they spent in 1994.¹²⁴ This requirement is referred to as the “Maintenance-of-Effort” (MOE) requirement—75% of what states spent in 1994 on cash, emergency assistance, job training, and child care spending connected to welfare programs.¹²⁵ If states fail to meet the MOE requirements, the federal government will reduce that state’s subsequent annual block grant by \$1 for every \$1 of the state’s shortfall. The MOE requirement increases to 80% if states fail to meet work participation standards.¹²⁶

States have to meet these federally-imposed TANF work participation standards not only to keep their MOE requirement at 75% of 1994 spending levels, but to continue receiving their block grant.¹²⁷ These standards require that at least half of all families and nine out of ten two-parent families must be “engaged in work”.¹²⁸ However, these standards are reduced if the state either reduces its caseload or spends more than the federal government requires under its MOE requirements.¹²⁹ As a result, caseload reduction and additional spending can lower the state’s effective participation rate.¹³⁰

122. See GENE FALK, CONG. RESEARCH SERV., R44188, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF): FINANCING ISSUES 2–3 (2015) (detailing how the TANF “block grant reflects peak spending for each state during the FY1992 to FY1995 period in TANF’s predecessor programs”).

123. See Morgan B. Ward Doran & Dorothy E. Roberts, *Welfare Reform and Families in the Child Welfare System*, 61 MD. L. REV. 386, 394 (2002) (describing how “PRWORA dramatically alters the way that states dispense public assistance to the poor” because it “offers financial bounties for states that are able to reduce the number of families on welfare” (citation omitted)); cf. Candice Hoke, *State Discretion Under New Federal Welfare Legislation: Illusion, Reality and a Federalism-Based Constitutional Challenge*, 9 STAN. L. & POL’Y REV. 115, 116 (1998).

124. See Wiseman, *supra* note 41, at 36.

125. See FALK, *supra* note 122, at 9.

126. See *id.*

127. *Id.*

128. See HEATHER HAHN, DAVID KASSABIAN & SHEILA ZEDLEWSKI, URBAN INST., TANF WORK REQUIREMENTS AND STATE STRATEGIES TO FULFILL THEM 1 (2012), <https://www.urban.org/sites/default/files/publication/25376/412563-TANF-Work-Requirements-and-State-Strategies-to-Fulfill-Them.PDF> [<https://perma.cc/25YK-9XPU>].

129. 45 C.F.R. § 261.43 (1999).

130. Actual penalties can be lowered for a variety of reasons including an economic downturn in

States allocated less and less spending to welfare programs over the twenty years before PRWORA.¹³¹ In the early years of TANF, large caseload reductions helped states meet their rates and freed up TANF funds for broader support for low-income families. Some states have broadened the definition of work, while other states have restricted it.¹³² Because the block grant has gone unchanged since Congress passed PRWORA, the TANF block grant is lower, adjusting for inflation and in nominal terms, than when Congress created the block grant in 1996.¹³³

The TANF block grant not only freezes the amount of relief available to families; its formula locks in expenditure inequalities among states. Because the formula is based on a state's highest annual expenditures on AFDC in the three years preceding PRWORA, those states that spent comparatively less on AFDC than its neighbors receive comparatively less federal funding for TANF. The purpose of taking the highest of the three previous annual expenditures was to prevent states from slashing expenditures significantly in the first years of TANF, but it locked in cross-state disparities. For instance, Arkansas received federal funding for TANF equal to \$500 per child per year, whereas the District of Columbia received TANF funds per poor child more than ten times that amount.¹³⁴

Aware that they were locking this interstate inequality into the statute, Congress created a supplemental grant for seventeen states that were disadvantaged by the block grant formula.¹³⁵ At the time of PRWORA's passage, one of the proponents of this Supplemental Grant argued on the Senate floor that the purpose of this Supplemental Grant was "to chip away at historical inequities between States due to the Federal Government's present system of awarding AFDC moneys."¹³⁶ Initially,

that particular area or because of a natural disaster. A state that does not meet the TANF work participation standard is penalized by a 5% reduction in the block grant in the first year, which is increased for each subsequent year by 2%, not to exceed 21%. LADONNA PAVETTI, BROOKINGS INST., *THE CHALLENGE OF ACHIEVING HIGH WORK PARTICIPATION RATES IN WELFARE PROGRAMS* (2004), <https://www.brookings.edu/research/the-challenge-of-achieving-high-work-participation-rates-in-welfare-programs/> [<https://perma.cc/N6XG-TJR2>].

131. See generally Paul E. Peterson, *Devolution's Price*, 14 YALE L. & POL'Y REV. 111 (1996).

132. See Joel F. Handler, *Welfare-to-Work: Reform or Rhetoric*, 50 ADMIN. L. REV. 635, 638 (1998) (characterizing "[s]tate authority over AFDC" as "greatly extended by converting the federal entitlement into block grants" (citation omitted)); Noah Zatz, *Welfare to What?*, 57 HASTINGS L.J. 1131, 1152–66 (2005).

133. See generally SCHOTT, PAVETTI & FINCH, *supra* note 56.

134. See generally SEITH, *supra* note 4.

135. See also "Rainy Day" and Other Special TANF Issues: Hearing Before the Subcomm. on Human Res. of the Comm. on Ways and Means H. of Rep., 107th Cong. (2001) [hereinafter *Rainy Day*].

136. 141 CONG. REC. S13,200 (daily ed. Sept. 11, 1995) (statement of Sen. Mack).

Congress increased the TANF block grant to these seventeen states through the Supplemental Grant by a rate of 2.5% annually.¹³⁷ In 2001, Congress stopped those annual increases and froze the Supplemental Grant.¹³⁸ As a result, Supplemental Grant states continued to receive less than 50% of the federal TANF funds per poor child than the other 33 states: “in 2009 . . . these states received \$712 per poor child (\$643 in block grant funds and \$69 in Supplemental Grants), compared to \$1,436 per poor child in other states.”¹³⁹

In 2011, Congress abandoned this commitment to reducing state disparities by eliminating the Supplemental Block Grant it had provided to these seventeen states, slashing \$108 million in annual TANF funds.¹⁴⁰ Congress did this at a time when fourteen of those states faced budget shortfalls amounting to \$24 billion (as much as 37% of their budgets).¹⁴¹ The child poverty rate in the Supplemental Grant states averaged 22.4% in 2009, 4.3% higher than the average for the other states and 2.7% higher than the national averages.¹⁴² Four of the five states with the highest rates of child poverty lost their Supplemental Grants. As a result, TANF’s funding formula guarantees that states that failed to invest in poor families over a three-year period in the mid-nineties are now locked into that spending period indefinitely.¹⁴³

D. Diverting the Block Grant to Fill Budget Holes

Due to its devolutionary design, TANF transformed federal cash assistance funding from “a specific funding source for cash assistance” into “a broad funding stream for various programs supporting low-income families.”¹⁴⁴ States, all but one of which are prohibited by their own

137. GREEN BOOK, *supra* note 62, at 7–19.

138. SEITH, *supra* note 4.

139. LADONNA PAVETTI ET AL., CTR. ON BUDGET & POLICY PRIORITIES, EXPIRATION OF TANF SUPPLEMENTAL GRANTS A FURTHER SIGN OF WEAKENING FEDERAL SUPPORT FOR WELFARE REFORM 4 (2011), <https://www.cbpp.org/research/expiration-of-tanf-supplemental-grants-a-further-sign-of-weakening-federal-support-for> [https://perma.cc/UL58-VSJ9].

140. *See id.* at 7.

141. *See id.* at 5.

142. *See id.* at 3.

143. SCHOTT, PAVETTI & FINCH, *supra* note 56, at 4 (“The Supplemental Grants were designed to lessen the resulting inequities and problems. Now, however, nothing in TANF does.”).

144. HEATHER HAHN, OLIVIA GOLDEN & ALEXANDRA STANCZYK, URBAN INST., STATE APPROACHES TO THE TANF BLOCK GRANT: WELFARE IS NOT WHAT YOU THINK IT IS, at v (2012), <http://www.urban.org/UploadedPDF/412635-State-Approaches-to-the-TANF-Block-Grant.pdf> [https://perma.cc/58NM-TC48] (examining state policies in five states).

constitutions to run deficits, face significant annual budget pressures.¹⁴⁵ In addition to those self-imposed constitutional constraints, some states have been sued to allocate additional resources to other areas, including child welfare.¹⁴⁶ As a result, the TANF block grant has become a tempting source of general revenue for states.¹⁴⁷ The transfer of the TANF block grant to fund foster care services is particularly prevalent: TANF “makes up about 19 percent of federal spending on child welfare services.”¹⁴⁸ This national rate of moving nearly one in five federal dollars of TANF funding to foster services masks even greater transfers in individual states: Texas reportedly “devot[es] more than half the state’s TANF and MOE spending to child welfare” and Michigan uses “close to 40 percent” of its TANF grant to fund foster services.¹⁴⁹ According to a Government Accountability Office (GAO) Report, thirty-one states reported spending TANF funds on child welfare services in 2011.¹⁵⁰ States are also under increasing pressure to pay for health care services despite drops in

145. Bagley, *supra* note 39, at 9–10 (“With the exception of Vermont, the states are legally obliged to balance their budgets every year.”); *see also* Freeman & Rogers, *supra* note 13, at 218 (noting “the near absence of redistributive fiscal federalism in the United States” due to “state constitutional bars on deficit spending” and “the relative efficiency of American capital markets in disciplining state borrowing”).

146. John O’Toole & Leecia Welch, *Litigation Leads to Sustainable Reform: A Case Study of Utah’s Success*, in CTR. FOR STUDY OF SOCIAL POLICY, FOR THE WELFARE OF CHILDREN: LESSONS LEARNED FROM CLASS ACTIONS LITIGATION 97–123 (2012), https://www.cssp.org/publications/child-welfare/class-action-reform/For-the-Welfare-of-Children_Lessons-Learned-from-Class-Action-Litigation_January-2012.pdf [<https://perma.cc/S6JR-DULG>].

147. GORDON B. MERMIN & C. EUGENE STEUERLE, URBAN INST., THE IMPACT OF TANF ON STATE BUDGETS 3 (1997), <https://www.urban.org/research/publication/impact-tanf-state-budgets> [<https://perma.cc/UAD4-82N2>] (explaining that various fiscal pressures “will encourage states to shift any TANF saving toward other functions” and that “TANF itself provides incentives to reduce welfare spending relative to former welfare law because of the switch from matching to block grants” because states “must bear the full cost of additional spending”); HAHN ET AL., *supra* note 144, at vii (concluding that “[a] major theme of state spending on TANF is that resources are transferred to other programs” such as services for foster youth); *see also* Kimberly J. Morgan, *Constricting the Welfare State: Tax Policy and the Political Movement Against Government*, in REMAKING AMERICA, *supra* note 13, at 27 (arguing that “[t]he redistributive programs of the welfare state cannot exist without a politically secure and stable source of finance”).

148. HAHN ET AL., *supra* note 144, at vii; *see also Welfare Reform*, *supra* note 112, at 18 (statement of Gordon L. Berlin, President of MDRC) (TANF appears to have “become a form of revenue-sharing for the states”).

149. HAHN ET AL., *supra* note 144, at vii (“[T]he transfer of TANF funds to child welfare is a way to solve state budgetary issues and does not imply any policy connection between the two programs.”); *see also* Susan Vivian Mangold & Catherine Cerulli, *Follow the Money: Federal, State, and Local Funding Strategies for Child Welfare Services and the Impact of Local Levies on Adoptions in Ohio*, 38 CAP. U. L. REV. 349, 352 (2009).

150. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-170, CHILD WELFARE: STATES USE FLEXIBLE FUNDS, BUT STRUGGLE TO MEET SERVICE NEEDS (2013).

revenue.¹⁵¹

For these reasons, less than 30% of the TANF block grant is actually spent on cash assistance.¹⁵² Like the 1996 funding formula of the block grant and the 2011 elimination of supplemental grants, the discretion afforded states to reappropriate TANF funds to meet other funding needs exacerbates inequalities in state spending and policies. As a result, TANF recipients “experience extraordinarily different programs in different states.”¹⁵³

E. Benefit Levels, Caseload Reduction, and the Rise of Extreme Poverty

While the TANF block grant has exacerbated massive differences across states, the funding mechanism has not led to a generous/parsimonious state divide. Rather, the TANF block grant has ensured that *every* state’s welfare program has deteriorated. No state’s cash assistance program post-welfare reform has more generous benefits than the AFDC program pre-welfare reform.¹⁵⁴ For a majority of TANF families, the purchasing power of their benefits is lower than 1996 levels when adjusting for inflation.¹⁵⁵ This twenty-year deterioration is even more striking in the context of the large declines in benefits over the twenty years before PRWORA when “cash assistance benefit levels for poor families with children fell by more than 40 percent in real terms in two-thirds of the states.”¹⁵⁶

As a result, the poverty-fighting benefit for families who still receive TANF has steadily diminished over time. In 2012, no state’s TANF

151. See Morgan, *supra* note 147, at 41.

152. See generally DeParle, *supra* note 111.

153. Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 582–99 (1999) (arguing that states are less generous than the federal government in social welfare spending and minority groups are more likely to be shut out of the budgetary process); Christine N. Cimini, *Welfare Entitlements in the Era of Devolution*, 9 GEO. J. ON POVERTY L. & POL’Y 89, 90 (2002) (“The confluence of devolution with the statutory ‘no entitlement’ disclaimer leaves welfare recipients more vulnerable to arbitrary and unchecked government action.”); HAHN ET AL., *supra* note 144, at v, vii (finding that of the five states studied the “state’s largest category of spending differs from that of the other four states”).

154. Gertrude Schaffner Goldberg, *Feminization of Poverty in the United States: Any Surprises?*, in POOR WOMEN IN RICH COUNTRIES 239 (Gertrude Schaffner Goldberg ed., 2009) (“Benefits for poor families have continued to decline under TANF, falling an average of 13% in real terms from 1994 to 2003.”).

155. IFE FINCH & LIZ SCHOTT, CTR. ON BUDGET & POLICY PRIORITIES, THE VALUE OF TANF CASH BENEFITS CONTINUED TO ERODE IN 2012 (2013), <https://www.cbpp.org/sites/default/files/atoms/files/3-28-13tanf.pdf> [<https://perma.cc/2CRU-XUF6>].

156. *Id.*

benefit level raised a TANF family of three to 50% of the of the federal poverty level (FPL).¹⁵⁷ In a majority of states, benefits were below 30% FPL.¹⁵⁸ In twenty-five states, TANF benefits amounted to less than half of the Fair Market Rent of a two-bedroom apartment.¹⁵⁹

Proponents of TANF point to the program's caseload reduction as a sign of its success. They often fail to point out that TANF's predecessor, AFDC, was largely a short-term benefit, too, with half of AFDC recipients leaving the program within one year.¹⁶⁰ Others have admitted that TANF was a successful intervention for some families, particularly those in which the parent could take advantage of the new EITC and strong economic growth in the late 1990s to leave cash assistance. The evidence of that claim of better economic outcomes for leavers is disputed: the GAO estimated in 2002 that former TANF recipients earned between \$9,500 and \$15,000 annually—still below the federal poverty level.¹⁶¹ Those who remain on the caseload are more at risk of deep or extreme poverty, defined as 50% FPL.¹⁶²

But there has been a less reported, more troubling consequence of the dramatic decline in states' welfare caseloads: those families who no longer receive cash assistance live in even deeper poverty. In 1995, AFDC raised 62% of children receiving assistance out of deep poverty.¹⁶³ In 2005, TANF lifted only 21% out of deep poverty.¹⁶⁴ The number of children shielded from deep poverty by TANF cash assistance dropped by 1.6 million over that decade.¹⁶⁵ In 2008, the Congressional Research Service calculated that 1.3 million families were neither working nor receiving TANF assistance.¹⁶⁶ Compared to the performance of the safety

157. *Id.*

158. *Id.*

159. *Id.*

160. Frank Munger, *Beyond Welfare Reform: Can We Build a Local Welfare State?*, 44 SANTA CLARA L. REV. 999, 1004 (2004) (citation omitted).

161. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-02-615T, WELFARE REFORM: STATES PROVIDE TANF-FUNDED WORK SUPPORT SERVICES TO MANY LOW-INCOME FAMILIES WHO DO NOT RECEIVE CASH ASSISTANCE 5 (2002).

162. ARLOC SHERMAN, CTR. ON BUDGET & POLICY PRIORITIES, SAFETY NET EFFECTIVE AT FIGHTING POVERTY BUT HAS WEAKENED FOR THE VERY POOREST (2009), <https://www.cbpp.org/sites/default/files/atoms/files/7-6-09pov.pdf> [<https://perma.cc/8Q2F-QH53>].

163. *Id.*

164. *Id.*

165. *Id.*; see generally PETER EDELMAN, SO RICH, SO POOR: WHY IT'S HARD TO END POVERTY IN AMERICA, 81–100 (2012) (discussing extent of extreme poverty in the United States).

166. ELIZABETH LOWER-BASCH, CLASP, TANF POLICY BRIEF: CASH ASSISTANCE SINCE WELFARE REFORM (2011), [https://www.clasp.org/sites/default/files/publications/2017/04/Cash Assistance.pdf](https://www.clasp.org/sites/default/files/publications/2017/04/Cash%20Assistance.pdf) [<https://perma.cc/74HA-JD6G>] (pointing out that many of these women who are

net across recessions, households in deep poverty suffered more in this recession than in past recessions because of the structure of TANF and its ties to employment.¹⁶⁷ The Urban Institute calculated that “one in four low-income single mothers nationwide—about 1.5 million—are jobless and without cash aid,” twice the rate of so-called “disconnected mothers” pre-PRWORA.¹⁶⁸ More than 40% experience that lack of employment or cash assistance for more than a year—and many of these disconnected mothers are disabled themselves, have disabled children, or are victims of domestic violence.¹⁶⁹ The consequences for families of the tightening eligibility, the frozen funding of block grants, the looting of TANF funds for other state purposes, and the time limits is a program that fails to shield families from extreme poverty and leaves millions of families, particularly those who because of disabilities or domestic violence are especially vulnerable to unemployment, without any income assistance.

III. THE LIMITS OF FISCAL DEVOLUTION AS NATIONAL POLICY

The devolutionary structure of TANF has not only led to a nationwide decline in efforts by states to reduce poverty among needy families. TANF’s fiscal design also ensured that the federal government was unable to deploy the program to assist those families in the wake of the financial crisis and the Great Recession. While other features of TANF have been well-documented, this aspect of TANF has been studied less and has important implications for any conversation about federalism. In this Part, I show how TANF’s limited role in responding to both Hurricane Katrina

disconnected from work or welfare “have disabilities that limit their ability to work, but either do not meet the stringent definition of disability needed for SSI benefits, or are waiting for their SSI applications to be approved”); *see also* INST. FOR WOMEN’S POLICY RESEARCH, THE CHILDREN LEFT BEHIND: DEEPER POVERTY, FEWER SUPPORTS (2003), <https://iwpr.org/publications/the-children-left-behind-deeper-poverty-fewer-supports/> [<https://perma.cc/8FAR-V7TN>].

167. *See* HEATHER HILL ET AL., MATHEMATICA, LIVING ON LITTLE: CASE STUDIES OF IOWA FAMILIES WITH VERY LOW INCOMES 7 (2001), <https://aspe.hhs.gov/system/files/pdf/177711/LiveOnLittle01.pdf> [<https://perma.cc/L3GD-CDMQ>]; SHEILA R. ZEDLEWSKI ET AL., URBAN INST., FAMILIES COPING WITHOUT EARNINGS OR GOVERNMENT CASH ASSISTANCE (2003), http://webarchive.urban.org/UploadedPDF/410634_OP64.pdf [<https://perma.cc/3D9U-PKTM>].

168. DeParle, *supra* note 111; *see also* REBECCA BLANK & BRIAN KOVAK, BROOKINGS INST., HELPING DISCONNECTED SINGLE MOTHERS (2008), https://www.brookings.edu/wp-content/uploads/2016/06/05_single_mothers_blank.pdf [<https://perma.cc/FX4E-BLVY>] (calculating that “roughly 2.2 million women who head families do not support themselves either with welfare or with their own earnings[]” along with “almost 4 million children who live in these severely economically challenged families”).

169. *See* GREGORY ACS ET AL., URBAN INST., FINAL SYNTHESIS REPORT OF FINDINGS FROM ASPE’S “LEAVERS” GRANTS (2001), <https://www.urban.org/research/publication/final-synthesis-report-findings-aspe-leavers-grants> [<https://perma.cc/XT89-7ZQD>].

and the Great Recession sheds serious doubt about whether the federal government can expand a fiscally devolved program. I reinforce that argument by highlighting the failure of one state's TANF program to respond to widespread need in the midst of the most recent economic downturn. Something progressive federalists often ignore is that once the federal government devolves authority to states, it is difficult for the federal government to quickly regain control of the program, particularly in emergencies. This logic of "devolution as statutized deterioration" has particularly troubling consequences when policymakers expect safety net programs to respond to economic downturns.

A. *The TANF Block Grant, Hurricane Katrina, and the Great Recession*

In responding to the financial crisis of 2008 and the recession that followed, the federal government's stimulus efforts reveal the limits of a fiscal federalist program like TANF during times of national emergency and widespread need. The federal government had three primary strategies in its safety net response to the recession, two of which are found in the American Recovery and Reinvestment Act (ARRA)¹⁷⁰ and the third of which was a regulatory attempt to revive a waiver program. All three of these efforts by the federal government highlight the TANF block grant's incapacity for national expansion and innovation. First, the Obama Administration failed to expand or reform the TANF block grant—instead relying on other safety net programs like SNAP to increase assistance to low-income families. Second, the Administration and Congressional allies, drawing on lessons from Hurricane Katrina, created a separate TANF Emergency Fund to encourage state expansion and avoid the block grant restrictions. Third, the Obama Administration tried unsuccessfully to recruit states to apply for waivers to abandon the work requirements in light of widespread unemployment among low-wage workers. Examining these three strategies highlights the limitations of fiscal federalism.

Recognition that TANF was ill-suited to serve as stimulus measure led the Obama Administration and Congress to rely on other safety net programs, like SNAP and Unemployment Insurance (UI) in ARRA. ARRA extended unemployment benefits through the rest of 2009 and increased the benefits by \$25 a week, providing \$40 billion for the benefits extension and increase.¹⁷¹ Through ARRA, the federal government

170. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

171. ALISON M. SHELTON ET AL., CONG. RESEARCH SERV., R40368, UNEMPLOYMENT INSURANCE

increased monthly SNAP benefits by 13.6% in April 2009 and rescinded time limits for adults without dependent children, allocating \$19.9 billion for the expansion of SNAP.¹⁷² In addition to their countercyclical effect, these two programs could help poor families—SNAP especially. With SNAP’s means-test, the Obama Administration and its allies in Congress knew that any expansion in SNAP would aid families during the deepest crisis of the American economy since the Great Depression.¹⁷³ These two appropriations, while large, were still smaller than ARRA’s \$87.1 billion Medicaid expansion.¹⁷⁴

In contrast, what was TANF’s role in the Obama Administration’s stimulus strategy? A \$5 billion fund to which states could apply.¹⁷⁵ There was no similar expansion in TANF benefit levels, eligibility criteria, or time limits. Without overhauling PRWORA, the federal government could not expand TANF in the ways that it had Medicaid, SNAP, and UI. Instead, it needed to rely on the states to access the funds and use them effectively.

The structure of the TANF block grant prevented the Obama Administration from expanding TANF nationwide in the face of the recession.¹⁷⁶ The 2008 recession was not the first time the government recognized TANF’s deficiency as a strand of the countercyclical safety net. There were similar concerns with the 2005 recession.¹⁷⁷ Congress had

PROVISIONS IN THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009 (2009).

172. BRYNNE KEITHE-JENNINGS & DOTTIE ROSENBAUM, CTR. ON BUDGET & POLICY PRIORITIES, SNAP BENEFIT BOOST IN 2009 RECOVERY ACT PROVIDED ECONOMIC STIMULUS AND REDUCED HARDSHIP (2015), <http://www.cbpp.org/research/food-assistance/snap-benefit-boost-in-2009-recovery-act-provided-economic-stimulus-and> [<https://perma.cc/W69E-TBU7>].

173. MARK NORD & MARK PRELL, USDA ECON. RESEARCH SERV., ERR-116, FOOD SECURITY IMPROVED FOLLOWING THE 2009 ARRA INCREASE IN SNAP BENEFITS (2011).

174. Farhana Hossain, Amanda Cox, John McGrath & Stephan Weitberg, *The Stimulus Plan: How to Spend \$787 Billion*, N.Y. TIMES (Jan. 5, 2015), https://www.nytimes.com/interactive/projects/44th_president/stimulus [<https://perma.cc/9P3N-X687>].

175. *Background Information about the TANF Emergency Fund*, OFF. FAMILY ASSISTANCE, U.S. DEP’T OF HEALTH & HUMAN SERVS. (Aug. 8, 2012), <https://www.acf.hhs.gov/ofa/resource/background-information-about-the-tanf-emergency-fund> [<https://perma.cc/NU49-XP3U>].

176. *Rethinking Welfare in the Great Recession: Issues in the Reauthorization of Temporary Aid to Needy Families: Before the S. Fin. Comm.*, 111th Cong. 11 (2010) [hereinafter *Rethinking Welfare*] (statement of Gordon L. Berlin, President of MDRC) (explaining how “an inflation-adjusted decline in funding, lack of reporting and thus accountability, strict and unmeetable [sic] participation standards, and MOE flexibility — may have combined to undermine the block grant’s ability to play a countercyclical role when the recession hit”).

177. Super, *supra* note 112, at 395 n.10 (pointing out that PRWORA’s “shift of financial responsibility” to the states “effectively prevent[ed] the cash assistance rolls from expanding to meet increased need in a recession for the first time since the Great Depression”).

created a TANF contingency fund, but states failed to qualify for it.¹⁷⁸ That was not surprising to anti-poverty advocates because, to access the contingency fund, states needed to match federal funds 100%.

When Hurricane Katrina devastated the Gulf Coast in 2005 and exposed the extent of deep poverty in the region, the federal government struggled to coordinate recovery efforts with state and local governments.¹⁷⁹ In the area of welfare, Congress could not compel the Gulf Coast states to increase TANF benefits or soften restrictive eligibility requirements.¹⁸⁰ Louisiana and Mississippi had notoriously parsimonious TANF programs; Louisiana's average monthly benefit consistently ranked as the lowest in the nation.¹⁸¹ Even if the states' programs had been more generous in terms of benefit levels, the number of families connected to TANF had dwindled. Like elsewhere in the U.S., fewer than one in five poor children on the Gulf Coast were receiving cash assistance.¹⁸²

In an echo of the disaster relief that predated and presaged the New Deal's expansion of the welfare state, Congress enacted the TANF Emergency Response and Recovery Act of 2005.¹⁸³ The 2005 statute altered several default funding rules and restrictions for the affected states, creating a separate TANF emergency fund regime and waiving the block grant requirements as applied to the federal TANF contingency fund.¹⁸⁴ While the statute did not provide additional funding, it transformed 20% of the original block grants to Alabama, Louisiana, and Mississippi into

178. *Rainy Day*, *supra* note 135, at 30–35 (statement of Harry J. Holzer, Georgetown University) (explaining why states consistently failed to qualify for contingency funds).

179. Pamela Winston et al., *Federalism After Hurricane Katrina: How Can Social Programs Respond to a Major Disaster?*, 81 TUL. L. REV. 1219, 1239 (2007) (“[I]f demand on TANF programs increases rapidly, states have limited ability to expand coverage. The block grant allotments are essentially frozen in time, unless changed legislatively.”).

180. Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 522 (2007) (describing the problems that “proceeded from unprecedented confusion among federal, state, and local responders regarding the allocation of their roles and responsibilities, and how to proceed in the face of this uncertainty”).

181. Winston et al., *supra* note 179, at 1238 (documenting that “[b]ecause Louisiana, Mississippi, and the other Gulf states typically provide among the lowest benefits in the nation, current block grants reflect the states’ historically low benefit levels” (citations omitted)).

182. *Id.* at 1239 (“Prior to Katrina, about 85% of poor Louisiana families and 82% of poor Mississippi families did not receive TANF cash benefits.”).

183. See MICHELLE LANDIS DAUBER, *THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE WELFARE STATE* 14–16 (2012).

184. TANF Emergency Response and Recovery Act Of 2005, Pub. L. No. 109-68, 119 Stat. 2003 (2005).

loans by waiving any penalty for nonpayment.¹⁸⁵ Any state could also qualify for 100% reimbursement from the TANF contingency fund for payments for non-recurring short-term cash benefits to any evacuee family who had been living in an affected area.¹⁸⁶ By freeing up the restrictions to accessing the loan and contingency funds, the federal government offered the Gulf Coast states, as well as states taking in evacuees, the chance to draw down federal funds to provide cash assistance.¹⁸⁷ But TANF's block grant structure limited long-term expansion of assistance to needy families affected by Hurricane Katrina.¹⁸⁸ States could only use the contingency fund for short-term, one-time aid to families with children who were *not already* receiving TANF.¹⁸⁹

With ARRA in 2009, the federal government essentially nationalized the post-Katrina TANF emergency efforts. Congress created, as part of ARRA, the TANF Emergency Contingency Fund or "Emergency Fund."¹⁹⁰ Funded at \$5 billion, the TANF Emergency Fund allowed states to submit applications to use some of those funds for any or all of three purposes: basic assistance, short-term, one-time benefits (similar to the 2005 Katrina efforts), and subsidized employment.¹⁹¹ To draw down from the TANF Emergency Fund, states needed to qualify for each category of funding separately.¹⁹² The legislation imposed a cap on what states could draw from the Emergency Fund and the regular contingency fund: over a

185. *Id.*

186. CONG. RESEARCH SERV., RS22246, TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF): ITS ROLE IN RESPONSE TO THE EFFECTS OF HURRICANE KATRINA (2007).

187. Winston et al., *supra* note 179, at 1260 (2007).

188. *Id.* at 1257 ("The scale of the states' short-term and long-term need to provide TANF cash assistance to Katrina victims is still unclear, however, leaving open the possibility that the fixed block grant structure may pose problems in the future, especially with Louisiana's deteriorated fiscal condition.").

189. MARK GREENBERG, CLASP, NEW TANF LAW PROVIDES ADDITIONAL FUNDS FOR KATRINA RELIEF: KEY IMPROVEMENTS STILL NEEDED 2 (2005), http://www.clasp.org/publications/new_tanf_bill_and_katrina_relief_cj2.pdf [https://perma.cc/8L29-W44L]; *see also* Winston et al., *supra* note 179, at 1259.

190. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 2101, 123 Stat. 115, 446 (2009). The statute labeled the TANF fund as "the Emergency Contingency Fund," but in subsequent agency guidance including the Policy Announcement, Health and Human Services referred to it as the Emergency Fund, to avoid confusion with the original Contingency Fund discussed above.

191. Bach, *supra* note 113, at 296; *see also* Peter Edelman & Barbara Ehrenreich, *Why Welfare Reform Has Failed*, WASH. POST (Dec. 6, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/04/AR2009120402604.html> [https://perma.cc/U3GY-VTBJ].

192. OFFICE OF FAMILY ASSISTANCE, U.S. DEP'T OF HEALTH & HUMAN SERVS., FEDERAL TANF CONTINGENCY FUNDS (2008), <http://www.acf.hhs.gov/programs/ofa/resource/policy/pi-ofa/2008/200804/pi200804> [https://perma.cc/JGV4-PWW3].

two-year period after the enactment of ARRA, a state could draw up to 50% of its basic block grant from the two funds.¹⁹³ States could use the Emergency Fund to cover 80% of their increased costs in any of the three categories.¹⁹⁴ Functionally, states had a 4:1 match on any funds it used on basic assistance, one-time short-term assistance, and subsidized employment.

The TANF Emergency Fund was relatively small compared to the other, aforementioned anti-poverty efforts in ARRA. While not enacting a subsidized jobs program the size of earlier efforts from the 1930s, 1960s, or 1970s, the TANF Emergency Fund did place a quarter million low-income individuals in subsidized jobs over a period of less than two years.¹⁹⁵ A majority of states created subsidized jobs programs for adults, but other states used the Emergency Fund to start programs that targeted non-TANF families, instead providing transitional jobs in summer or year-round programs for young people aged twenty-four and under.¹⁹⁶ Other states, including many of the states who had historically meager TANF programs, did not create any subsidized employment programs.

As a result, the TANF Emergency Fund was the opposite of targeted social policy. Instead, the appropriation exacerbated state inequalities. States had to apply. A lot of states and municipalities were confused by the process.¹⁹⁷ There was little coordination between state and local policymakers, and the process benefited those states and localities that were typically successful at drawing down federal funds. Most importantly, the TANF Emergency Fund did nothing to reform the TANF block grant or the nearly \$30 billion states expend under the MOE requirements.¹⁹⁸ Because of states' use of TANF funds in previous years, states failed to successfully deploy TANF to combat poverty in the wake

193. *Id.*

194. *Id.*

195. LADONNA PAVETTI ET AL., CTR. ON BUDGET & POLICY PRIORITIES, CREATING SUBSIDIZED EMPLOYMENT OPPORTUNITIES FOR LOW-INCOME PARENTS: THE LEGACY OF THE TANF EMERGENCY FUND (2011), <https://www.cbpp.org/research/creating-subsidized-employment-opportunities-for-low-income-parents> [<https://perma.cc/FCC8-D3VU>].

196. *Id.*

197. LIZ SCHOTT, CTR. ON BUDGET & POLICY PRIORITIES, OPPORTUNITIES UNDER THE TANF EMERGENCY FUND CREATED BY THE FEDERAL RECOVERY ACT (2009), <https://www.cbpp.org/research/opportunities-under-the-tanf-emergency-fund-created-by-the-federal-recovery-act> [<https://perma.cc/UBX2-9X8Z>].

198. *Id.*

of the Great Recession.¹⁹⁹ The fund was exhausted by December 2010.²⁰⁰ With the supplemental grants and the Emergency Fund gone, Congress now provides no additional TANF funding to help states respond to the increase in need stemming from an economic downturn or to address the inequities resulting from the funding formula of the TANF block grant.

In addition to relying on other programs like SNAP and UI at the expense of TANF, as well as creating a separate emergency fund to avoid the restrictionist block grant, the Obama Administration attempted to relieve states of the work participation rates described above through a new waiver program.²⁰¹ Just as the waivers from the 1980s and early 1990s enabled states under AFDC to experiment with different policies before the passage of PRWORA, the Obama Administration offered states the opportunity, albeit without additional funds, to expand services. The waiver program allowed states that undertake alternative welfare-to-work strategies to substitute other performance measures for the TANF statutory work participation standards. While the waiver programs would need to be formally evaluated to receive federal funding, the programs would allow states to count “pre-employment activities such as education, rehabilitative activities, and job search[es]” toward the work standards.²⁰² The waivers would also give the states flexibility to experiment with the state’s entire TANF caseload or a specific population, as well as flexibility to conduct state-wide changes or demonstration projects in certain areas of the state. HHS announced that the typical waiver would last five years.²⁰³

Unfortunately, this waiver program, although permitting states to provide additional cash assistance to hard-to-employ adults, once again risked exacerbating state inequalities. As with the Emergency Fund, the federal government had to rely on states to opt-in to this programmatic

199. SCHOTT, PAVETTI & FINCH, *supra* note 56, at 2 (describing how “facing budget shortfalls, many states cut already-low TANF benefit amounts further, shortened TANF time limits, or took other actions to shrink caseloads or keep them from rising much in the face of mounting need”).

200. GENE FALK, CONG. RESEARCH SERV., R41078, *THE TANF EMERGENCY CONTINGENCY FUND 2* (2010) (describing how HHS announced the fund had been depleted by August 2010 and “no additional TANF funds to address the continuing effects of the recession”).

201. GENE FALK, CONG. RESEARCH SERV., RL32760, *THE TEMPORARY ASSISTANCE FOR NEEDY FAMILIES (TANF) BLOCK GRANT: RESPONSES TO FREQUENTLY ASKED QUESTIONS 3* (2016).

202. GENE FALK, CONG. RESEARCH SERV., R42627, *TEMPORARY ASSISTANCE FOR NEEDY FAMILIES: WELFARE WAIVERS* (2012).

203. *Id.*

expansion.²⁰⁴ Only one state applied for the waiver.²⁰⁵ The Obama Administration eventually abandoned the waiver program after intense opposition from House Republicans.²⁰⁶

The federal government responded to the imbalances of state efforts on cash assistance to needy families by absolving them further of TANF requirements under federal law. The Obama administration's unsuccessful efforts to enact the waiver program underscored the paradoxical effects of devolution: the only way a President can increase TANF's poverty-fighting effect is to grant the states more discretion, an approach that hinders federal government's ability to claw back programmatic control in the future.

The federal government's welfare strategy in response to the Great Recession belies TANF's deteriorative logic. In ARRA, the federal government responded to the deterioration of TANF in three ways: 1) using other programs to reduce hardship among poor families, 2) creating a relatively unrestricted fund, set apart from the block grant mechanism, and 3) attempting to devolve even more authority to states. TANF's inability to respond to the deepest economic crisis since the Great Depression is a lesson in the structural deficiencies of fiscal federalism: once budgetary discretion is given to the states, the federal government will not be able to reform or expand the program in a timely fashion, if ever. The block grant is a clumsy and crude mechanism for programmatic change—and a weak lever for economic stimulus. It prevents the national government from targeted expansion and programmatic reform.²⁰⁷ As discussed below, as currently constituted and implemented in the states, TANF lacks the countercyclical character of other safety net programs like SNAP.²⁰⁸

204. See OFFICE OF FAMILY ASSISTANCE, U.S. DEP'T OF HEALTH & HUMAN SERVS., GUIDANCE CONCERNING WAIVER AND EXPENDITURE AUTHORITY UNDER SECTION 1115 (2012), <http://www.acf.hhs.gov/programs/ofa/resource/policy/im-ofa/2012/im201203/im201203> [<https://perma.cc/9ZWF-RUTX>]; David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 284 (2013) ("In recently issued guidance, the Secretary of Health and Human Services claims to possess the discretionary authority under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 to waive some of the provisions that set forth work requirements for funding recipients.").

205. See OFFICE OF FAMILY ASSISTANCE, *supra* note 204 (citing Minnesota's application).

206. *Statement of Administration Policy: H.R. 890 - Preserving Work Requirements for Welfare Programs Act of 2013*, AM. PRESIDENCY PROJECT (Mar. 12, 2013), <http://www.presidency.ucsb.edu/ws/index.php?pid=103343> [<https://perma.cc/346G-3YGW>] ("Ultimately, no States formally applied for State waivers, deterred in part by inaccurate claims about what the policy involves.").

207. EDELMAN, *supra* note 165, at 4 (contrasting how "[s]tates get a bonus for doing outreach on food stamps[]" but "receive what amounts to a bonus for keeping people off the TANF rolls").

208. *Id.* at 3 (explaining how "SNAP has been a powerful antirecessionary force[]" while TANF

B. Connecticut as a Case Study of TANF's Failure in the Great Recession

In recessions, we expect more families to seek assistance to make ends meet. It is useful to examine one state's TANF program to see how TANF no longer responds to increased need. Connecticut's TANF program, Jobs First, should have exhibited greater countercyclical growth, just like SNAP.²⁰⁹ Yet, Jobs First did not respond to increased need during the Great Recession. While it is difficult to determine what accounts for Jobs First's unresponsiveness to the most recent recession, one of the more stringent aspects of the program is a likely suspect: the twenty-one-month lifetime limit.

Connecticut has the shortest state-imposed time limit on cash assistance benefits in the nation: twenty-one months.²¹⁰ This time limit is significantly shorter than most states. Indeed, the modal time limit imposed by states is the federal statutory lifetime limit of sixty months.²¹¹

In December 2007, 91,071 people were unemployed in Connecticut.²¹² Two years later, that number had nearly doubled.²¹³ In 2008, 9.4% of Connecticut residents (320,554) had incomes under the Federal Poverty

"barely moved").

209. Benjamin Landy, *Graph: Balancing the Budget on the Backs of the Poor*, CENTURY FOUND. (Apr. 12, 2012), <http://tcf.org/blog/detail/graph-balancing-the-budget-on-the-backs-of-the-poor> [https://perma.cc/WKV8-G74P] (describing how "[r]eformed" welfare—unlike the Supplemental Nutrition Assistance Program (SNAP), or food stamps—had lost its critical counter-cyclical function").

210. DAVID KASSABIAN ET. AL., URBAN INST., *THE WELFARE RULES DATABOOK: STATE TANF POLICIES AS OF JULY 2010*, at 146 tbl.IV.C.1 (2010), <https://www.urban.org/research/publication/welfare-rules-databook-state-tanf-policies-july-2010> [https://perma.cc/K9D3-R685]; see also LYNNE FENDER ET AL., U.S. DEP'T OF HEALTH & HUMAN SERVS., *LINKING STATE TANF AND RELATED POLICIES TO OUTCOMES: PRELIMINARY TYPOLOGIES AND ANALYSIS* (2002), http://www.urban.org/UploadedPDF/410607_Linking_State_TANF_Policies.pdf [https://perma.cc/L2E2-5K4H]; see generally Emily Bazelon & Tamara Watts, *Welfare Time Limits on the Ground: An Empirical Study of Connecticut's Jobs First Program*, 32 CONN. L. REV. 717, 720–21 (2000) (analyzing data and discussing implications of experiences of Jobs First recipients).

211. KASSABIAN ET. AL., *supra* note 210, at 146 tbl.IV.C.1.

212. LADONNA PAVETTI ET AL., CTR. ON BUDGET AND POLICY PRIORITIES, *TANF RESPONDED UNEVENLY TO INCREASE IN NEED DURING DOWNTURN* (2011), <http://www.cbpp.org/files/1-25-11tanf.pdf> [https://perma.cc/3VGS-LTWQ]. CBPP's unemployment data afford easier cross-state comparisons, but the Connecticut Department of Labor statistics are available at the Department's website. The definition of unemployment, of course, does not represent the sum total of adults in Connecticut who are out of work, but only those who are unemployed and seeking employment. The unemployment figures exclude discouraged workers and the involuntarily underemployed.

213. *Id.* at 14 (the number of Connecticut residents who were unemployed had risen to 165,861 by 2009—an increase of 82.1%).

Level, up from 7.9% in 2007.²¹⁴ Indeed the estimated increase by the American Community Survey for Connecticut's poverty rate from 2007 to 2008 was the largest statistically significant increase of any state in the U.S. during that year.²¹⁵ Despite this massive economic downturn, the number of families enrolled in Jobs First, Connecticut's cash assistance program under the TANF block grant, barely budged. According to the Center on Budget and Policy Priorities, over the same two-year period, Jobs First caseloads increased by a mere 4.6% (from 18,736 to 19,595).²¹⁶

Some might suggest that in spite of the sharp decrease in jobs and the sharp increase of poverty in the state, there might have been other reasons why more families did not enroll in Jobs First during the worst economic downturn since the Great Recession. First, many of Connecticut's unemployed were ineligible for Jobs First because their income and assets were too high for the means-tested program.²¹⁷ Still, those who would likely have been eligible for Jobs First because of their low levels of income were more likely to be unemployed during this recession, as the downturn led to increased rates of unemployment for less-skilled workers as compared to those who had some form of higher education.²¹⁸ Second, other families might have exhausted their lifetime limit for Jobs First. Perhaps others did not want to rely on the state's safety net. Finally, adult cash assistance recipients are overwhelmingly female and the recession disproportionately affected men.²¹⁹

Nonetheless, Connecticut's SNAP program did see a dramatic increase in caseloads during the same period. During the two years discussed

214. News Release, Conn. Voices for Children, Poverty Increase in Connecticut Was Largest in Nation, Census Data Show (Sept. 29, 2009), http://www.ctvoices.org/sites/default/files/econ09censuspovertyrelease_0.pdf [<https://perma.cc/D6WL-3L7Q>].

215. ALEMAYEHU BISHAW, U.S. CENSUS BUREAU, POVERTY: 2009 AND 2010, AMERICAN COMMUNITY SURVEY BRIEFS (2011), <http://www.census.gov/prod/2011pubs/acsbr10-01.pdf> [<https://perma.cc/QZX5-RB5Y>]; News Release, Conn. Voices for Children, *supra* note 214.

216. PAVETTIET AL., *supra* note 212, at 13 tbl.B1, 16 tbl.B4. See generally LEGISLATIVE PROGRAM REVIEW & INVESTIGATIONS COMM., CONN. GEN. ASSEMBLY, CONNECTICUT'S WELFARE REFORM INITIATIVE 15 (2006) (showing trends in caseloads since Connecticut's AFDC waiver reforms and implementation of PRWORA).

217. *Connecticut: Temporary Assistance for Needy Families (TANF) Cash Assistance*, NAT'L CTR. FOR CHILDREN IN POVERTY, http://www.nccp.org/profiles/CT_profile_36.html [<https://perma.cc/J2UZ-DY2S>].

218. Michael Greenstone & Adam Looney, *What Is Happening to America's Less-Skilled Workers? The Importance of Education and Training in Today's Economy*, BROOKINGS INST. (Dec. 2, 2011), http://www.brookings.edu/opinions/2011/1202_jobs_greenstone_looney.aspx [<https://perma.cc/LGB3-L7CD>].

219. Catherine Rampell, *As Layoffs Surge, Women May Pass Men in Job Force*, N.Y. TIMES (Feb. 5, 2009), <http://www.nytimes.com/2009/02/06/business/06women.html> [<https://perma.cc/PF2D-Y9YF>].

above, food stamps caseloads in Connecticut increased from 117,550 to 170,340, or 44.9%—nearly 10 times the increase of Jobs First.²²⁰ Reasons for this discrepancy might be that cash assistance is arguably more stigmatizing to receive than food stamps, or the more aggressive SNAP outreach relative to cash assistance.²²¹

Another explanation for this tenfold increase is different eligibility requirements for the two benefits. For families without an elderly or disabled member of the household, SNAP has essentially one eligibility requirement: an income limit.²²² That limit is 185% of the federal poverty line, e.g. \$2,823 monthly for a family of three.²²³ Eligibility requirements are different for households with an elderly member or someone receiving disability income.²²⁴

Jobs First has stricter eligibility guidelines.²²⁵ To be eligible for the Jobs First Employment Services (JFES), families must, after meeting the initial means test, attend two orientation and needs assessment meetings with caseworkers and then pass the Combined Incomes Test and the Benefits Test.²²⁶ Furthermore, like a handful of other states, Connecticut's cash assistance program has two tracks for recipients, one track for those who are exempted from the time limits and other requirements and another track for those who are not. As will be discussed below, this two-track system might explain why Jobs First caseloads did not increase significantly during the recession.

220. PAVETTI ET AL., *supra* note 212.

221. See Jason DeParle & Robert Gebeloff, *Food Stamp Use Soars, and Stigma Fades*, N.Y. TIMES (Nov. 28, 2009), <http://www.nytimes.com/2009/11/29/us/29foodstamps.html> [<https://perma.cc/G9N2-2P44>].

222. *SNAP Special Rules for the Elderly or Disabled*, USDA, <https://www.fns.usda.gov/snap/snap-special-rules-elderly-or-disabled> [<https://perma.cc/J75A-3QLT>].

223. *Id.*

224. *Supplemental Nutrition Assistance Program*, CT.GOV., <http://www.portal.ct.gov/DSS/SNAP/Supplemental-Nutrition-Assistance-Program---SNAP/Eligibility> [<https://perma.cc/K7BR-2BKD>].

225. See generally CONN. DEP'T OF SOC. SERVS., TANF CASELOAD REDUCTION REPORT FOR FEDERAL FISCAL YEAR 2017, at 4 (2016) ("The eligibility and policies regarding [Jobs First] have not been modified since 10/1/06.").

226. LEGISLATIVE PROGRAM REVIEW & INVESTIGATIONS COMM., *supra* note 216, at 35.

Table 1:
Increases in Unemployment, Cash Assistance Caseloads, and SNAP
Caseloads from December 2007 to December 2009

	United States	Connecticut
Unemployment	7,600,627 (+102.7%)	74,790 (+82.1%)
JF/TFA caseload	234,832 (+13.4%)	859 (+4.6%)
SNAP caseload	5,566,506 (+45.3%)	52,790 (+44.9%)

To be sure, the divergent responses to the recession by these two safety net programs are not unique to Connecticut. SNAP was more responsive to the recession than cash assistance was in every state.²²⁷ Yet, a closer look at the data reveals that Jobs First was particularly unresponsive relative to the nationwide trend and to the corresponding programs in neighboring states. The national increase in TANF caseloads was 13.4%, nearly three times the increase in Connecticut.²²⁸ Thirty-nine states, including every state in New England except Rhode Island, saw greater caseload increases in their cash assistance programs than Connecticut did.²²⁹ By contrast, the increase in SNAP recipients in Connecticut tracked almost exactly to the national trend: 44.9% compared to 45.3%.²³⁰

Although Jobs First has the shortest state-imposed time limit among the fifty states and D.C., Connecticut softens this harsh rule somewhat by exempting from the time limit families whom caseworkers have deemed unemployable under certain conditions,²³¹ and allowing non-exempt

227. PAVETTI ET AL., *supra* note 212.

228. *Id.*

229. *Id.*

230. *Id.*

231. CONN. GEN. STAT. § 17b-112(b) (2010) (listing seven exemptions: “(1) A family with a needy caretaker relative who is incapacitated or of an advanced age, as defined by the commissioner, if there is no other nonexempt caretaker relative in the household; (2) a family with a needy caretaker relative who is needed in the home because of the incapacity of another member of the household, if there is no other nonexempt caretaker relative in the household; (3) a family with a caretaker relative who is not legally responsible for the dependent children in the household if such relative’s needs are not considered in calculating the amount of the benefit and there is no other nonexempt caretaker relative in the household; (4) a family with a caretaker relative caring for a child who is under one year of age and who was born not more than ten months after the family’s enrollment if there is no other nonexempt caretaker relative in the household; (5) a family with a pregnant or postpartum caretaker relative if a physician has indicated that such relative is unable to work and there is no other nonexempt caretaker relative in the household; (6) a family with a caretaker relative determined by the commissioner to be unemployable and there is no other nonexempt caretaker relative in the household; and (7) minor parents attending and satisfactorily completing high school or high school equivalency programs”).

recipients to file for two six-month extensions. In 2003, it became much more difficult to gain more than two extensions when the legislature adopted stricter criteria. Non-exempt families can request two six-month extensions. Extensions are granted to an individual:

[W]ho has made a good faith effort to comply with the requirements of the program and despite such effort has a total family income at a level below the payment standard, or has encountered circumstances preventing employment including, but not limited to (1) [d]omestic violence or physical harm to such family's children; or (2) other circumstances beyond such family's control.²³²

The Department of Social Services may grant a subsequent six-month extensions if *each* adult in the family meets at least one of the following criteria:

[1)] [T]he adult cannot work because of domestic violence or another reason beyond the adult's control; [2)] the adult has two or more substantiated barriers to employment; [3)] the adult is working thirty-five or more hours per week, is earning at least the minimum wage and continues to earn less than the family's temporary family assistance payment standard; or [4)] the adult is employed and works less than thirty-five hours per week due to (i) a documented medical impairment that limits the adult's hours of employment, provided the adult works the maximum number of hours that the medical condition permits, or (ii) the need to care for a disabled member of the adult's household, provided the adult works the maximum number of hours the adult's caregiving responsibilities permit.²³³

However, over a seven-year period, fewer and fewer Jobs First recipients received more than two extensions: "[t]he number of clients who were on the program for 27 or more months has decreased dramatically from a high of 5,040 in 1999 to 873 in 2006 (i.e., the 21-month initial period plus at least one six month extension)."²³⁴

As the Connecticut General Assembly noted:

[C]aseloads have shrunk significantly since the advent of welfare reform. Because the time-limited cases are much more likely to be removed from the caseload, since [Fiscal Year 2001] the number of exempt cases has either equaled or exceeded those that are time-limited. As of June 2006, there were 7,555 cases that

232. *Id.* § 17b-112(c).

233. *Id.*

234. *See* LEGISLATIVE PROGRAM REVIEW & INVESTIGATIONS COMM., *supra* note 216, at 11.

were time-limited and 12,305 exempt.²³⁵

This two-track system might explain why Jobs First caseloads did not increase as dramatically as SNAP caseloads in Connecticut. If the majority of Jobs First cases are exempt, either because the adult is not included in the assistance unit or is deemed unemployable by the state, then we might expect the program to be immune to changes in the employment rate.

Very few states have evaluated their cash assistance programs using econometric, let alone experimental, methods. Connecticut is an exception. Once Connecticut implemented these requirements, the state's Department of Social Services contracted the Manpower Development Research Corporation (MDRC) to conduct a large-scale evaluation of Jobs First, randomly assigning welfare applicants and recipients in two offices to program and control groups from January 1996 to February 1997 and collecting data on these individuals for four years.²³⁶ However, this study concluded just as the state instituted new criteria for additional extensions.

This detailed, longitudinal evaluation showed that while Jobs First has progressive aspects, such as a generous earnings disregard,²³⁷ the program did not generate broad income gains or improved outcomes for children.²³⁸ "Once Jobs First families began reaching the time limit, their

235. *Id.* at 5–6.

236. DAN BLOOM ET AL., MDRC, JOBS FIRST: FINAL REPORT ON CONNECTICUT'S WELFARE REFORM INITIATIVE ES-1 (2002), https://www.acf.hhs.gov/sites/default/files/opre/ct_jobsfirst.pdf [<https://perma.cc/VUY8-JJE3>] [hereinafter BLOOM ET AL., JOBS FIRST: FINAL REPORT]. For the interim evaluation, see the following reports: DAN BLOOM ET AL., MDRC, JOBS FIRST: IMPLEMENTATION AND EARLY IMPACTS OF CONNECTICUT'S WELFARE REFORM INITIATIVE (2000), <https://files.eric.ed.gov/fulltext/ED439274.pdf> [<https://perma.cc/7JSZ-M88R>]; DAN BLOOM ET AL., MDRC, CONNECTICUT POST-TIME LIMIT TRACKING STUDY: SIX-MONTH SURVEY RESULTS (1999), <https://www.mdrc.org/publication/connecticut-post-time-limit-tracking-study> [<https://perma.cc/4AN3-L9NL>]; JO ANNA HUNTER-MANNS ET AL., MDRC, CONNECTICUT POST-TIME LIMIT TRACKING STUDY: THREE-MONTH SURVEY RESULTS (1998), <https://www.mdrc.org/publication/connecticut-post-time-limit-tracking-study-three-month-results> [<https://perma.cc/FS3P-3U3Q>]; LAURA MELTON & DAN BLOOM, MDRC, CONNECTICUT'S JOBS FIRST PROGRAM: AN ANALYSIS OF WELFARE LEAVERS (2002), <https://files.eric.ed.gov/fulltext/ED450259.pdf> [<https://perma.cc/J7T4-8HPK>].

237. MARY FARRELL ET AL., MDRC, WELFARE TIME LIMITS: AN UPDATE ON STATE POLICIES, IMPLEMENTATION, AND EFFECTS ON FAMILIES 27 (2008), https://www.mdrc.org/sites/default/files/full_609.pdf [<https://perma.cc/DE3B-CF9E>] ("In Connecticut, the financial incentives to work are unusually generous. Recipients can earn up to the federal poverty level (which was \$1,431 per month for a family of three in 2007) and still receive the full grant amount (between \$553 and \$656, depending on the region within the state where the grant is administered). Many Connecticut staff recommend that recipients use the disregard, although as time limits have increasingly become a reality, a minority of staff said that they do encourage recipients to bank months.").

238. *Id.*

welfare receipt was reduced and their income gains disappeared.”²³⁹ In the General Assembly report conducted by the Legislative Program Review and Investigation Committee (PRI), “[a]lmost half” of a sample of non-exempt Jobs First recipients “had no earnings in the quarter after they left [cash assistance].”²⁴⁰

Compared to other state programs, Jobs First, along with other state schemes with similarly severe time-limit policies, “did not consistently have the largest early impacts on employment.”²⁴¹ Furthermore, the MDRC evaluation suggested that the positive employment outcomes for recipients might have been a function of the strong economy at the time, which did not bode well for the program during an economic downturn.²⁴²

While there were small gains for young children, the results for adolescents were mixed and levels of material hardship were high for participants in the experimental and control groups alike.²⁴³ Troubling facts given the social, cognitive, and health consequences for children living in deep poverty.²⁴⁴ In the MDRC study, a little more than 50% of the Jobs First recipients reached the time limit during the four-year survey, approximately two-thirds of whom were granted at least one extension due to unemployment or insufficient earnings.²⁴⁵ Many who received an extension left welfare in the next year or two.²⁴⁶

The MDRC evaluation also suggested that Connecticut families’ benefits through Jobs First were particularly susceptible to termination.²⁴⁷ From 2002 to 2005, with the exception of New York, which transfers its families into a separate state-funded general assistance program, Connecticut closed more cash assistance cases than any other state.²⁴⁸ In 2003, Connecticut reduced the income eligibility for transitional child care benefits from 75% to 55% of statewide median.²⁴⁹ Moreover, some

239. BLOOM ET AL., JOBS FIRST: FINAL REPORT, *supra* note 236, at Key Findings.

240. LEGISLATIVE PROGRAM REVIEW & INVESTIGATIONS COMM., *supra* note 216, at 39.

241. FARRELL ET AL., *supra* note 237, at 71.

242. BLOOM ET AL., JOBS FIRST: FINAL REPORT, *supra* note 236, at SUM-33 (“During the study period, the economy was very strong; it is not clear how program participants would have fared in an economy with higher unemployment rates and fewer job opportunities.”).

243. *See id.*

244. *See generally* Judith R. Smith et al., *Consequences of Living in Poverty for Young Children’s Cognitive and Verbal Ability and Early School Achievement*, in CONSEQUENCES OF GROWING UP POOR 132 (Greg J. Duncan & Jeanne Brooks-Gunn eds., 1997).

245. BLOOM ET AL., JOBS FIRST: FINAL REPORT, *supra* note 236, ch.3 at 56.

246. FARRELL ET AL., *supra* note 104, at 185–86 tbl.C.5.

247. BLOOM ET AL., JOBS FIRST: FINAL REPORT, *supra* note 236, at SUM-33.

248. *Id.*

249. LEGISLATIVE PROGRAM REVIEW & INVESTIGATIONS COMM., *supra* note 216, at 6.

of the funds for TANF were diverted to fund foster care services.²⁵⁰

Jobs First's failure to respond to the Great Recession illustrates a defining feature of TANF: unlike AFDC was before or SNAP is now, TANF is not countercyclical. At the times when poor families are most likely to resort to the safety net, TANF fails to support them. Whether analyzing TANF's inadequate responses to regional crises like Hurricane Katrina or national ones like the Great Recession, the conclusion remains the same: the federal government will struggle to expand an already devolved distributive program. The only question that remains is what have we learned from the twenty-year legacy of TANF. Is TANF a policy experiment not to be repeated? Or is it the future of the American safety net?

IV. TANF: DEVOLUTIONARY OUTLIER OR WAVE OF THE FUTURE?

In Part IV, I provide counterexamples of increased anti-poverty spending through programs that do not rely on state funds and limit state discretion relative to TANF, including SNAP and the EITC. I also discuss recent Congressional proposals to block grant other public benefit programs.

A. *TANF as an Outlier in the American Safety Net*

TANF's record must be understood against the backdrop of the federal government's expansion of SNAP and the EITC. Whereas states are given a lump sum for their cash assistance program, the federal government pays for states' SNAP enrollment as the program rises and falls. The EITC, by contrast, is funded entirely by the federal government and administered through the IRS.²⁵¹

As seen above in the case of Connecticut, compared to SNAP, TANF provides the *prima facie* case that block grants lead to a deterioration of an anti-poverty program. SNAP has been described as the "fundamental

250. SHELLEY GEBALLE & JUDITH SOLOMON, CAREENING TOWARDS CRISIS: THE STATE AND FEDERAL FUNDING OF CHILD WELFARE SERVICES IN CONNECTICUT (2004), <http://www.ctvoices.org/sites/default/files/welf04careensum12.pdf> [<https://perma.cc/C97Q-N4N2>].

251. Some have argued that in designing the 1935 Social Security Act, the federal government "enacted three programs with differing federal-state divisions of authority: social security itself, unemployment insurance, and welfare . . . known as Aid to Families with Dependent Children." Peter B. Edelman, *A Conversation on Federalism and the States: The Balancing Act of Devolution*, 64 ALB. L. REV. 1091, 1093 (2001); see also Ann Shola Orloff, *The Political Origins of America's Belated Welfare State*, in THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES 37 (Margaret Weir et al. eds., 1988).

safety net in the U.S.” because “it is the only public assistance program that is available to all income-eligible families”²⁵² In 2011, spending on SNAP amounted to \$70 billion, compared to \$31 billion for TANF and \$59 billion for the federal EITC.²⁵³ That same year, nearly one in seven Americans were receiving SNAP, lifting approximately 4 million families out of poverty and 3.5 million out of deep poverty.²⁵⁴ Unlike TANF, the administration of SNAP varies little across the country, with far less programmatic discretion given to the states.

One could argue that, in addition to the SNAP expansion, President Obama did enact an anti-poverty agenda—it’s called the Affordable Care Act. Both anti-poverty advocates and their critics rightly view the Medicaid expansion as a massive anti-poverty effort.²⁵⁵ But the Medicaid expansion reinforces, rather than undermines, the argument that TANF is structurally incapable of expansion. Medicaid’s funding mechanism allows the federal government to create a matching funds system or for the federal government to foot the bill.²⁵⁶ But with TANF, all President Obama could recommend is that Congress increase the block grant. Why would a President interested in targeting poverty do that? Considering the ways states have used block grants in the past for populations and programs that have little to no relationship to TANF, an increase in the size of the grant would just give states more funds to do with as they please. There would be no guarantee that the additional funds would go to families in the form of increased cash assistance or other work supports. Indeed, the mere expansion of block grants would not change the restrictionist logic of the funding formula; it would simply increase the financial rewards to states that reduce their caseload. Any national policymaker looking to reduce poverty would seek out programs like SNAP and UI that deliver benefits to low-income families immediately

252. Hilary Hoynes, Diane Whitmore Schanzenbach & Douglas Almond, *Long Run Impacts of Childhood Access to the Safety Net*, 106 AM. ECON. REV. 903, 904–05 (2013); see also David A. Super, *The Quiet “Welfare” Revolution: Resurrecting the Food Stamp Program in the Wake of the 1996 Welfare Law*, 79 N.Y.U. L. REV. 1271, 1380–90 (2004); DeParle & Gebeloff, *supra* note 221.

253. OFFICE OF MGMT. & BUDGET, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2011 (2010).

254. BARTFELD ET AL., INST. FOR RESEARCH ON POVERTY, SNAP TRENDS AND ANTIPOVERTY IMPACTS (2015), <https://www.irp.wisc.edu/publications/policybriefs/pdfs/PB7-SNAP-Trends-Antipoverty-Impacts.pdf> [<https://perma.cc/5PA2-TEYJ>] (“[I]n 2011, roughly 4 million persons were lifted out of poverty and another 3.5 million were lifted out of deep poverty by SNAP benefits.”).

255. Benjamin D. Sommers & Donald Oellerich, *The Poverty Reducing Effect of Medicaid*, 32 J. HEALTH ECON. 816, 816–17 (2013).

256. For descriptions of the federal-state funding arrangements in Medicaid, see generally MEDICAID AND DEVOLUTION: A VIEW FROM THE STATES (Frank J. Thompson & John J. DiIulio, Jr., eds., 1998); Holahan & Pohl, *supra* note 11; ROSE, *supra* note 11.

and without interference.²⁵⁷

Even more centralized than SNAP and UI, which are federally-funded and designed but administered by the states, the federal EITC is administered by the Internal Revenue Service. Some have questioned the effectiveness of using the tax code to deliver income support to needy families,²⁵⁸ while others have questioned the political incentives for EITC expansion.²⁵⁹ Some scholars have pointed out that the EITC does not serve the same families as TANF or SNAP because it requires sustained participation in the formal economy.²⁶⁰ Nevertheless the EITC's expansion, in the face of TANF's deterioration suggests the value of a centrally administered social program.²⁶¹ Since the most recent recession, some states, like North Carolina and Michigan, have rolled back or eliminated their state EITC because of budget pressures.²⁶²

B. *Our Block-Grant Future? Current Congressional Proposals*

The 115th Congress is currently considering whether to block grant Medicaid, SNAP, and other safety net programs. Many public benefits experts and advocates fear that the TANF Block Grant could be used as a model for a wave of newly-devolved American social policy.

Engineered by Speaker Paul Ryan, the House Republicans' policy

257. President Obama rarely mentioned poverty, but some thought he did not need to because the economic recovery allowed him to expand safety net programs in the name of stimulus rather than poverty alleviation.

258. See generally Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1994); Dennis J. Ventry, Jr., *Welfare by Any Other Name: Tax Transfers and the EITC*, 56 AM. U. L. REV. 1261 (2007).

259. Morgan, *supra* note 147, at 37 ("The 'hidden' nature of tax expenditures may facilitate their creation and expansion, but their invisibility does not enable much political credit claiming . . ."); see also SUZANNE METTLER, *THE SUBMERGED STATE* 38–47 (2011) (describing how low-salience programs, like the EITC and other tax expenditures, are less likely to induce political activism by their recipients).

260. Zatz, *supra* note 132, at 1179.

261. See LARRY BARTELS, *UNEQUAL DEMOCRACY* 246–47 (2008); Joshua L. Boehm et al., *The Earned Income Tax Credit, Low-Income Workers, and the Legal Aid Community*, 3 COLUM. J. TAX L. 176, 194–202 (2013) (calling for centralized reforms by IRS); Sara Sternberg Greene, *The Broken Safety Net: A Study of Earned Income Tax Credit Recipients and A Proposal for Repair*, 88 N.Y.U. L. REV. 515, 561–65 (2013) (same).

262. See Lee Weisbecker, *McCrary Signs Bill Eliminating Tax Credit*, TRIANGLE BUS. J. (Mar. 13, 2013, 9:00 AM), <http://www.bizjournals.com/triangle/news/2013/03/13/mccrary-signs-bill-eliminating-tax.html> [https://perma.cc/KUF5-W323] (recounting the repeal of North Carolina's EITC); *Study: Michigan Among States Raising Poor's Taxes*, ASSOCIATED PRESS (Nov. 15, 2011), http://www.mlive.com/politics/index.ssf/2011/11/study_michigan_among_states_ra.html [https://perma.cc/45P6-THTH] (noting that "Michigan, New Jersey and Wisconsin all have scaled back tax credits for low-income workers in recent years").

agenda for the 2016 election cycle, “A Better Way,” included vague promises to consolidate anti-poverty programs into a single grant to states.²⁶³ In the past, Speaker Ryan as Chairman of the House Committee on Ways and Means and as Chairman of the House Budget Committee has proposed Medicaid block grants.²⁶⁴ President Trump is also on the record supporting block grants for Medicaid.²⁶⁵

As for SNAP, Speaker Ryan’s “Better Way” Agenda did not propose block granting the program, but the Fiscal Year 2016 House Budget Resolution did.²⁶⁶ Tom Price, who chaired the House Budget Committee at the time, served as President Trump’s first Health and Human Services Secretary.²⁶⁷ When Speaker Ryan chaired the Budget Committee, he proposed merging SNAP with ten other low-income programs into one “Opportunity Grant” that would give states a block grant for all eleven programs.²⁶⁸ Similarly, in the 114th Congress, the chair of the House Subcommittee on Early Childhood, Elementary, and Secondary Education introduced legislation that would create block grants for nutrition programs in three states.²⁶⁹

263. TASK FORCE ON POVERTY, OPPORTUNITY, AND UPWARD MOBILITY, A BETTER WAY: OUR VISION FOR A CONFIDENT AMERICA 16 (2016), https://abetterway.speaker.gov/_assets/pdf/ABetterWay-Poverty-PolicyPaper.pdf [<https://perma.cc/Q884-V8LK>] (“Instead of the federal government continuing to develop policies separately for each of the more than 80 welfare programs, states should be allowed to link these programs in a way that provides a more holistic approach for families they serve.”).

264. See EDWIN PARK & JUDITH SOLOMON, CTR. ON BUDGET AND POLICY PRIORITIES, PER CAPITA CAPS OR BLOCK GRANTS WOULD LEAD TO LARGE AND GROWING CUTS IN STATE MEDICAID PROGRAMS (2016), <http://www.cbpp.org/research/health/per-capita-caps-or-block-grants-would-lead-to-large-and-growing-cuts-in-state> [<https://perma.cc/4VGB-N3QW>]; EDWIN PARK & MATT BROADDUS, CTR. ON BUDGET & POLICY PRIORITIES, RYAN BLOCK GRANT PROPOSAL WOULD CUT MEDICAID BY MORE THAN ONE-QUARTER BY 2024 AND MORE AFTER THAT (2014), <http://www.cbpp.org/research/ryan-block-grant-proposal-would-cut-medicare-by-more-than-one-quarter-by-2024-and-more> [<https://perma.cc/XR9D-2UAW>].

265. See *Health Care*, TRUMP PENCE, <https://www.donaldjtrump.com/policies/health-care/> [<https://perma.cc/2B45-VYSG>] (supporting an effort to “[m]aximize flexibility for states via block grants”).

266. See generally H. BUDGET COMM., 114TH CONG., FY2016 BUDGET RESOLUTION: A BALANCED BUDGET FOR A STRONGER AMERICA 29 (Comm. Print 2015), <http://budget.house.gov/uploadedfiles/fy16budget.pdf> [<https://perma.cc/5ANY-QXAC>] (proposing to convert SNAP to a “State Flexibility Fund”).

267. *Remarks by the Vice President at a Swearing-in Ceremony for Secretary Price*, WHITE HOUSE (Feb. 10, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/10/remarks-vice-president-swearing-ceremony-secretary-price> [<https://perma.cc/J867-4LLZ>].

268. See generally PAUL RYAN, H.R. BUDGET COMM., 113TH CONG., EXPANDING OPPORTUNITY IN AMERICA: A DISCUSSION DRAFT FROM THE HOUSE BUDGET COMMITTEE (Comm. Print 2014), http://budget.house.gov/uploadedfiles/expanding_opportunity_in_america.pdf [<https://perma.cc/6N45-SVSK>].

269. Improving Child Nutrition and Education Act of 2016, H.R. 5003, 114th Cong. (2016),

The House Budget for fiscal year 2018 proposed \$150 billion in cuts to SNAP by imposing not just direct cuts to the program, but also by transferring “significant authority” over SNAP to the states over the following decade.²⁷⁰ Most think-tanks and analysts have read that proposal to mean something similar to block grants.²⁷¹ Similarly, the House Budget calls for block granting Medicaid.²⁷² Indeed, in the most recent legislation to repeal the Affordable Care Act, Graham-Cassidy, Senator Graham defended the Medicaid block grant proposal by referencing TANF: “[i]n 1996, we block granted money for welfare reform, and it worked like a charm.”²⁷³

If Congress passes and the President signs something along the lines of the House budget or Graham-Cassidy, states would be faced with a fixed sum to run their Medicaid and SNAP programs. States would only have two options during the next recession: 1) reduce the number of recipients or 2) reduce the services or benefits to the recipients. Of course, states can choose to divert funding from other programs or raise revenue, but states have no mechanism to receive further funding from the federal government. As a result, a Medicaid or SNAP block grant program will fail to properly function during times of increasing need.

Furthermore, without inflationary controls or additional appropriations from Congress, block grants to SNAP and Medicaid would lose value over time. TANF’s block grant has “eroded substantially due to inflation and is worth 33 percent less than it was 20 years ago.”²⁷⁴ Even if there are no

http://edworkforce.house.gov/uploadedfiles/improving_child_nutrition_and_education_act_of_2016.pdf [https://perma.cc/A2AX-QRHU]; see also Lydia Wheeler, *Fight Erupts in Congress over School Lunch Money*, HILL (July 4, 2016), <http://thehill.com/regulation/legislation/286266-fight-erupts-in-congress-over-school-lunch-money> [https://perma.cc/C9PA-3WWD].

270. *House FY18 Budget: Building a Better America*, HOUSE BUDGET COMMITTEE, <https://budget.house.gov/budgets/fy18/> [https://perma.cc/R3B8-FLVF].

271. ISAAC SHAPIRO ET AL., CTR. ON BUDGET & POLICY PRIORITIES, HOUSE GOP BUDGET CUTS PROGRAMS AIDING LOW- AND MODERATE-INCOME PEOPLE BY \$2.9 TRILLION OVER DECADE (2017), <https://www.cbpp.org/research/federal-budget/house-gop-budget-cuts-programs-aiding-low-and-moderate-income-people-by-29> [https://perma.cc/R3B8-FLVF] (describing “transfer [of] ‘significant authority’ over SNAP to the states” as “something akin to a ‘block grant’”).

272. *House FY18 Budget*, *supra* note 270; see also SHAPIRO ET AL., *supra* note 271 (explaining how House budget would “restructure Medicaid by converting virtually the entire program to a block grant or a grant that pays each state a capped amount of money per enrollee”).

273. Robert Pear, *G.O.P. Points to Welfare Overhaul as a Model for Health Care*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/us/politics/obamacare-repeal-graham-cassidy-welfare-reform.html> [https://perma.cc/GJ43-VBFH].

274. See LADONNA PAVETTI, CTR. ON BUDGET & POLICY PRIORITIES, COMMENTARY: HOUSE COMMITTEE MISSES OPPORTUNITY TO IMPROVE TANF (2016), <http://www.cbpp.org/family-income-support/commentary-house-committee-misses-opportunity-to-improve-tanf> [https://perma.cc/XR9D-2UAW].

economic downturns or inflation, the sheer growth of the population will mean that programs funded through block grants will face fewer dollars per recipient over time. Like TANF, block grants to Medicaid or SNAP would not only freeze the amount of funding (and therefore the amount of relief), but would also aggravate unequal expenditures among states.²⁷⁵ And as TANF's legacy demonstrates, block grants give states excessive flexibility to use block grant funds for other purposes. Block grant programs typically have few reporting or accountability provisions.²⁷⁶

Of course, one could imagine improvements on the block grant formula so as to mitigate the risk that Medicaid and SNAP go the way of TANF. TANF lacks three features of a more responsible block grant regime that Medicaid and SNAP proposals could include. First, the federal government should set and enforce basic minima below which no state can go.²⁷⁷ With TANF, the federal government set an initial amount of funding in the block grant formula that has not been increased or adjusted for inflation. Current block grant proposals for Medicaid and SNAP could include provisions that adjust the block grant for inflation or require annual increases.

A second feature which would lessen the damage of block grants is to supplement funding in states that have historically underfunded safety net programs. With TANF, the federal government stopped increasing supplemental grants in 2001 and did away with these equalizing measures altogether in 2011.²⁷⁸ However, future Congressional proposals could include supplemental grants for Medicaid and SNAP.

The third feature would be to require "systematic benchmarking and evaluation of state experiments and national promotion of results."²⁷⁹ The federal government does not conduct, nor does it require the states to conduct, systematic research on the effects of changes to TANF. In fact, the federal government does not even require the states to report how many TANF families each state is serving through non-cash programs and

275. See JOHN HOLAHAN & MATTHEW BUETTGENS, URBAN INST., BLOCK GRANTS AND PER CAPITA CAPS: THE PROBLEM OF FUNDING DISPARITIES AMONG STATES (2016), <http://www.urban.org/research/publication/block-grants-and-capita-caps> [<https://perma.cc/4NR5-XDW4>].

276. See *Rethinking Welfare*, *supra* note 176 (testimony of Gordon L. Berlin, President of MDRC before the Senate Finance Committee, on September 21, 2010).

277. Freeman & Rogers, *supra* note 13, at 206.

278. PAVETTI ET AL., *supra* note 139.

279. Freeman & Rogers, *supra* note 13, at 206.

benefits.²⁸⁰ Current Congressional proposals could require far more extensive reporting on how states are using block grant funds. However, there is no indication that the proposed House budget makes any of these improvements on the design flaws of the TANF Block Grant, with the possible exception of a per capita cap in Medicaid.

Even still, while these potential improvements on the TANF Block Grant would mitigate some of the most damaging features of block grants, they would most likely be overwhelmed by the strong incentives in states to ration services in the face of these fixed federal appropriations. The legacy of TANF should dampen expectations that transforming Medicaid or SNAP into block grant programs would lead to anything other than programmatic deterioration.

CONCLUSION

TANF's twenty-year legacy is a cautionary tale for two audiences: academics who embrace devolution of funding decisions and program design to states and anti-poverty advocates who seek to strengthen the safety net. Programs like SNAP and the EITC, not TANF, should serve as the models for future funding schemes proposed by anti-poverty advocates.

Lawyers tend to focus more on statutes and regulations and less on the implementation of the same. They see policies instead of programs—categorical eligibility rather than actual receipt. As a result, progressive advocates of devolution focus on statutory regimes as the evidence of federalism's benefits at the expense of the outcomes of that devolution.

This theory of federalism tends to emphasize regulatory regimes governing private action over distributive schemes that disburse public funds. For instance, gay marriage is a right that a state can make available with relative programmatic ease. TANF is not so easily provided. State action is more diffuse, obscure, and complicated when it comes to public benefits. In the morass of state finances, researchers miss the structural deficiencies that characterize state-led social policy.

Scholars are right to point to state innovation in areas of civil rights and environmental law, but they miss the dark side of devolution. States are capable of innovation in certain areas of policy and law, but are incapable of systematic reform in others. Put another way, proponents of a progressive federalism often rely on examples in which states improve

280. FALK, *supra* note 201, at 7 (“Federal TANF reporting requirements focus on families receiving only ongoing cash assistance, with no complete reporting on families receiving other TANF benefits and services.”).

upon or surpass national efforts in extending rights and regulations (federalism's floors) at the expense of examples in which states struggle to distribute resources (federalism's ceilings).²⁸¹ Those who are tempted to devolve authority to states should recognize the implications of their focus on floors upon which states can build rather than ceilings which hamper states' redistributive efforts. It is not an accident that the areas scholars identify as models of progressive federalism are ones that do not necessarily involve distributive programs or fiscal federalism: areas like environmental policy, education standards, and gay rights.

By giving states a remarkable degree of discretion in how they design, administer, and fund cash assistance for needy families, the federal government has permitted states to use those funds for unrelated programs, restrict eligibility, and fail to report how the program or its recipients have fared. What's more, by freezing the block grant at a funding level that is twenty years past and by repealing the supplemental funding that supported states with historically low levels of funding, the federal government has retreated from its initial commitment to create a national minimum for state effort in this area of social policy.

Even when the federal government wanted to use TANF as part of the largest economic stimulus package ever passed by Congress, it could not simply increase benefit levels or loosen eligibility requirements. Instead, the federal government had to rely on other programs, create a separate emergency fund, and recruit states to apply for waivers to set up more generous programs—a call to which no state responded. The devolution and fiscal federalism of TANF has weakened our national capacity to set safeguards and design supports for poor families—a segment of our society that is challenging to organize at any level of government. The experience of TANF and its block grant funding mechanism is a cautionary tale to any advocate who seeks to devolve further responsibility to state governments and to scholars who believe federalist reforms can improve distributive programs.

281. I am indebted to David Super who sketched out distinctions between regulatory and fiscal federalism in *Rethinking Fiscal Federalism*, 118 HARV. L. REV. 2544 (2005).